RECORD, CASE No. 14,465.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 639.

JACOB C. MANN, APPELLANT,

vs.

THE TACOMA LAND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1892.

1 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant. } Bill in Equity.

To the judges of the circuit court of the United States for the district of Washington:

Jacob C. Mann, of the city of Tacoma, county of Pierce and State of Washington, a citizen of the State of Washington, brings this his bill against the Tacoma Land Company, a corporation created by and existing under the laws of the State of Pennsylvania and having its principal place of business in the State of Washington, at the city of Tacoma, Pierce county, ans State of Washington, a citizen of the State of Pennsylvania, and thereupon your orator complains and alleges:

First.

That at all times hereinafter mentioned the defendant, The Tacoma Land Company, was and is a corporation created by and existing under the laws of the State of Pennsylvania.

Second.

That on the 29th day of October, 1889, the following-described premises were unoc-upied and unappropriated lands of the
2 United States, not mineral and unsurveyed, to wit:

Commencing at a point which is three thousand nine hundred and sixty feet west of the southeast corner of section 34, in township 21 north, of range 3 east, of the Willamette meridian, running thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet to place of beginning, and containing forty acres.

Third.

That on the said 29th day of October, 1889, your orator, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, applied to enter said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lans*d* were situated, and thereupon filed with the register and receiver of said land office certificate of location, No. E 222, for forty acres; issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, to-

gether with a description by metes and bounds of said described premises and a map of said tract, and on the 30th day of October, 1889, entry was allowed and your orator received from said register and receiver a certificate for said lands entitling your orator to a patent to said lands when the same should have been surveyed by authority of the Governor of the United States.

3 Fourth.

That by virtue of said application and certificate your orator is the owner of said described premises and entitled to the sole and exclusive possession of the same.

Fifth.

That on the 18th day of September, 1889, the following-described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point eighty chains east and twenty chains north of the southeast corner of section 32, township 21 north, of range 3 east, of the Willamette meridian, thence east twenty chains, thence north twenty chains, thence south twenty chains, thence west twenty chains to the place of beginning, and containing forty acres.

Sixth.

That on the 18th day of September, 1889, one Charles T. Manning, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, applied to enter said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. E 111, for forty acres, issued by virtue of a decree of the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, together with a description by metes and

4 bounds of said described premises and a map of said tract, and on the 31st day of October, 1889, said entry was allowed and said Manning received from said register and receiver a certificate for said lands, entitling said Manning to a patent to said lands when the same should have been surveyed by the authority of the Government of the United States.

Seventh.

That by virtue of said application and certificate the said Charles T. Manning became the owner of said described premises and entitled to the sole and exclusive possession of the same.

Eighth.

That your orator, by conveyance from said Charles T. Manning and one Rosa L. Manning, wife of the said Charles T. Manning, became

and is now the owner of said premises and entitled to all the right, title, and interest of the said Charles T. Manning and Rosa L. Manning thereto.

Ninth.

That on the 18th day of September, 1889, the following-described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point forty chains east of the northwest corner of section 4, township 20 north, of range 3 east, of the Willamette meridian, running thence south twenty-two and eighty one-hundredths chains, thence west seventeen and one one-hundredths chains to the Judson donation claim, thence with the meanders of said donation claim north six degrees west three and eighty-five one-hundredths chains, north fifteen degrees west ten chains; thence
5 north ten and twelve one-hundredths chains to the fifth standard parallel, thence east twenty chains to the place of beginning.

Tenth.

That on said 18th day of September, 1889, one Albert E. Joab, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, applied to enter said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. E 273, for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States, upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee, under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract.

Eleventh.

That by virtue of said application the said Albert E. Joab became entitled to a patent to said lands when the same should have been surveyed by the authority of the Government of the United States and became the owner of said premises and entitled to the sole and exclusive possession of the same.

Twelfth.

That your orator, by conveyance from said Albert E. Joab, has become and is now the owner and is entitled to the right, title, and interest of the said Joab in and to said premises.

6 Thirteenth.

That the premises described in paragraphs second and fifth of this bill adjoin each other, and if the survey of the United States Gov-

ernment were extended over said lands would be the west half of the southwest quarter of section 34, township 21 north, of range three east, of the Willamette meridian.

Fourteenth.

That all of the lands described in this complaint are what are commonly called "tide lands," being situated between the ordinary line of high water and the line of ordinary low water of Commencement bay, a navigable arm of the sea, within the ebb and flow of the tide of the waters of Pierce county, State of Washington, and are valuable solely for the construction of docks and wharves at which ocean steamers, ships, and local craft may load and discharge cargoes, and for the construction on said lands of warehouses, buildings, and other structures for commercial purposes.

Fifteenth.

That the Puyallup river is a navigable fresh-water stream, having a course northwesterly through section three and a course westerly through section four, in said township 20, and thence into the waters of Commencement bay, westerly to the main land and from thence north, hugging the shore line; that said river has a well-defined channel through which said river has been accustomed to flow from time immemorial into and through the waters of said Commencement bay; that near the mouth of said river there is an island, lying in said sections 3 and 4, and being lot 2 of section 3 and lots 1 and 3 of section 4, which is commonly known as the "Boot," and being the land pre-empted by one David Kelly, the southerly side of which island forms the right bank of said Puyallup river.

7

Sixteenth.

That the defendant, for the purpose of diverting the waters of said Puyallup river from the channel in which they have been accustomed to flow, has constructed a tight dam from the southeastern point of said island southerly to the main land across the channel of said Puyallup river and has also constructed a tight dam from the northerly side of lot 2 of section 3, township 20 north, range 3 east, of said island near to and parallel with the section line dividing said sections 3 and 4 to the southerly point of a small island, being lot 5 of said section 3 and lot 9 of said section 4, lying north of said first-mentioned island, and has without any claim or color of title to the last herein-described lands in paragraph ninth of this bill, against your orator or against any other person whatever, entered upon said lands and is constructing a line of piling parallel with and 200 feet easterly from the shore line of sections 32 and 33 in township 21, and section 4 in township 20 north, of range 3 east, and across the premises described in paragraph ninth of this bill, and threatens and unless restrained will, by means of a steam dredger, tear up the mud and sand forming the surface of said premises described in paragraph ninth of this bill for a width of 300 feet

and not less than — feet in depth along the entire length of said
premises and will cast the said mud and earth between the
8 said line of piling and shore line of said sections 32 and 33
in township 21, and section 4 in township 20, and will fill up the said channel; that by means of said dam and embankments the waters of the Puyallup river have been diverted and forced from their course and thrown into a new channel running due north to the waters of Commencement bay.

Seventeenth.

That the defendant, without any claim or color of title to said lands against your orator or against any person whatever, has entered upon the lands described in paragraphs second and fifth of this bill and willfully and without a shadow of right is proceeding to cut a deep channel or canal 300 feet in width and of no less than — feet in depth from the section line dividing townships 20 and 21 north, of range 3 east, and extending northerly 300 feet through the west half of the west half of section 34, township 21 north, of range 3 east, of the Willamette meridian, described as commencing at a point three thousand nine hundred and sixty feet west of the southeast corner of section 34, township 21 north, of range 3 east, thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet, to place of beginning, and also at a point described as 80 chains east and 20 chains north of the southeast corner of section 32, in said township and range, thence north 20 chains, thence east twenty chains, thence south twenty chains, thence west twenty chains, to place of beginning, with the design, purpose, and intention when said channel shall have been completed through the lands aforesaid
of causing the waters of said Puyallup river to so diverge as
9 aforesaid from their usual and customary channel and to
lead said waters into the channel, now being made as aforesaid.

Eighteenth.

That the making of said channel as aforesaid would permanently injure the said lands of plaintiff and would absolutely destroy that portion through which the channel is being made for the use and construction of wharves or other valuable improvements; that the waters of the Puyallup river through the said acts of the defendant will be let in upon the said lands of your orator and will permanently overflow the same; that they will not be useful for any valuable purpose whatever, and thereby great and irreparable injury will accrue to your orator.

Nineteenth.

That your orator intends filling in said lands aforesaid and erecting thereon warehouses and other buildings, over and across which lands general traffic may be carried on to and from the city of Tacoma.

Twenty.

That the said Payallup river has a swift and eddying current, and that since this defendant has diverted the waters of the said river from their course and by reason thereof certain wharves erected by parties other than your orator and in the line of the said river as it is now running without any channel have been by means of the action of the waters of said river underminded, and large quantities of freight lying thereon have been discharged into the waters of Commencement bay, and your orator alleges that if defendant is not restrained from executing the design of digging such chan-
10 nels across said lands of plaintiff's hereinbefore described and leading the waters of said river into said channel that it will be impossible to construct and maintain strong and safe wharves or docks on said lands or to fill in the same, and the value of said land will be permanently destroyed.

Twenty-first.

That by reason of the acts of the defendant already committed your orator has been damaged in the sum of ten thousand dollars, and unless said defendant is restrained from executing its design as hereinbefore alleged your orator will suffer damage in the sum of, at least, one hundred thousand dollars.

Wherefore your orator prays that the defendant may be restrained from any further violation of such rights, and that your honors may grant a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendant, their officers, attorneys, agents, servants, and workmen, from any further construction of said piling and of said channels, and that your honors, upon the rendering of the decree above prayed, may assess or cause to be assessed the damages your orator has sustained by reason of said erection and the construction of said dams, embankments, and filling and the digging of such channels.

And your orator further prays that said dams, embankments, piling, and other erections by means of which the waters of the said Puyallup river have become diverted from their course may be demolished, and your orator further prays that a provisional and preliminary injunction may be issued restraining the said defendant from continuing the construction of said piling, embankments, and dams, and dredging and cutting of channels through the
11 lands of your orator or through any other lands by means of which the waters of the said Puyallup river may be diverted from their course and thrown into and upon the lands of your orator, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant upto your orator a writ of injunction conformable to the prayers of this bill and to issue a writ of subpœna of the United States of America, directed to the said Tacoma Land Company, its officers, attorneys, agents, servants, and workmen, commanding it on a day certain to appear and answer *under* this bill and to abide and perform such order and

decree in the premises as to the court may seem proper and required by the principals of equity and good conscience.

JUDSON, SHARPSTEEN & SULLIVAN,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Washington. }

On this the 12th day of July, 1890, before me personally appeared Jacob C. Mann, the complainant above named, who, being by me duly affirmed, deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same are true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JACOB C. MANN.

Affirmed and subscribed before me this 12th day of July, 1890.

M. L. CLIFFORD,
United States Commissioner.

11½ Endorsed: Bill in equity. Filed July 12th, 1890. A. Reeves Ayres, clerk.

12 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant. } Affidavit of Jacob C. Mann in Support of Petition for an Injunction.

UNITED STATES OF AMERICA, }
District of Washington, } *ss:*

Jacob C. Mann, being first duly sworn, on his oath says that he is the plaintiff in the above-entitled cause; that he is a resident of the city of Tacoma, county of Pierce and State of Washington, and a citizen of said State of Washington.

That on the 29th day of October, 1889, the following-described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point which is 3,960 feet west of the southeast corner of section 34, in township 21 north, of range 3 east, of the Willamette meridian, running thence north 1,320 feet, thence west 1,320 feet, thence south 1,320 feet, thence east 1,320 feet to the place of beginning; which said tract of land is designated by the word "Mann" on the plat filed herewith and referred to in this
13 affidavit and by said reference made a part hereof, and which is marked Exhibit "A;" that on the said 29th day of October, 1889, affiant, under and by virtue — of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April the 5th, 1872, applied to enter said tract of

land at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. E. 222 for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract, and on the 30th day of October, 1889, said entry was allowed and affiant received a certificate for said lands entitling him to the possession of said lands when the same should have been surveyed by authority of the Government of the United States; that by virtue of said patent and certificate affiant is the owner of said described premises and entitled to the sole and exclusiv*f* possession of the same; that on the 18th day of September, 1889, the following-described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point 8 chains east and 20 chains north of the southeast corner of section 32, township 21 north, of range 3 east, of the Willamette meridian, thence north 20 chains, thence east
14 20 chains, thence south 20 chains, thence west 20 chains to the place of beginning, containing forty acres, which said tract of land is designated by the word "Manning" on the plat filed herewith and referred to in this affidavit and by said re*f*erence made a part hereof, and which is marked "Exhibit A."

That on the said 18th day of September, 1889, one Charles T. Manning, under and by virtue of an act of the Congress o*n* the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, applied to enter said tract of land as aforesaid described at the United States land office at Seattle, Washington T*w*rritory, that being the land office for the district in which said lands were situated, and the*e*rupon filed with the register and receiver of said land office certificate of location No. E. 111 for fort*h* acres, issued by virtue of a decree of the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and map of said tract, and on the 31st day of October, 1889, said entry was allowed and said Manning received a certificate to said lands entitling said Manning to a patent to said lands when the same sh*p*uld have been surveyed by authority of the United States.

That by virtue of said application and certificate said Charles T. Manning became the owner of the said described premises and entitled to the sole and exclusi*n*f possession of the same.

That affiant, by conveyance from Charles T. Manning and
15 Rosa L. Manning, wife of said Charles T. Manning, has become the owner and is entitled to all the right, title, and interest of the said Charles T. Manning and Rosa L. Manning in and to said premises.

That on the 18th day of September, 1889, the following-described premises were unoc-upied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point forty chains east of the corner of section 4, township 20 north, of range 3 east, of the Willamette meridian, running thence south 22 and 80 one-hundredths chains, thence west 17 & one one-hundredth chains to the Judson "donation claim;" thence with the meandering of said "donation claim" north six degrees west three and eighty-five one-hundredths chains, north 15 degrees west ten chains; thence north 10 and 12 one-hundredths chains to the fifth standard parallel; thence east 20 chains to the place of beginning, which said tract of land is designated by the word "Joab" on the plat filed herewith and referred to in this affidavit and by said reference made a part thereof, and which is marked Exhibit "A."

That on the said 18th day of September, 1889, one Albert E. Joab, under and by virtue of the act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, applied to enter said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said lands certificate of location No. E 273 for 40 acres, issued
16 by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under sais act of Congress aforesaid, together with a description by metes and bounds of said described premises and the map of said tract.

That by virtue of said application the said Albert E. Joab became entitled to a patent to said lands when the same should have been surveyed by the authority of the Government of the United States; that by virtue of said application the said Albert E. Joab became the owner of said premises and entitled to sole and exclusive possession of the same.

That affiant, by conveyance from said Albert E. Joab, has become the owner and is entitled to all the right, title, and interest of the said Joab in and to said lands.

That the Puyallup river is a navigable, fresh-water stream, having a well-defined channel through which the waters of said river have been accustomed to flow, until the commission of the acts hereinafter mentioned, from time immemorial; that the course of said river is as shown on the map marked herein as Exhibit "A," and is designated on said map by the words "Puyallup river."

That the course of said river after it leaves its banks and becomes mingled with the waters of Commencement bay is as designated by parallel lines in red ink enclosing the words "Puyallup river."

That the waters of said river have made for themselves a well-defined channel in said Commencement bay, which said chan-
17 nel, until the commission of the acts hereinafter mentioned,

ran through the southwest corner of the land of the plaintiff, designated on said map by the word "Joab."

That the defendant, Tacoma Land Company, is a corporation created and existing under the laws of Pennsylvania, having its principal place of business in the city of Tacoma, Pierce county, Washington.

That the said defendant has constructed across the said Puyallup river from the southeastern extremity of an island forming the right bank of said river at its mouth, which said island is commonly known as the "Boot" and which is also known as the David Kelly pre-emption claim, to and upon the left bank of said Puyallup river, opposite the southeastern extremity of said island, which said dam is indicated by two parallel lines drawn in red ink, enclosing the word "dam," indicated on the map, "Exhibit A."

That the defendant has also constructed a dam from a point on the northerly side of said island to the southerly extremity of a small island lying parallel with the line dividing sections three and four, in township 20 north, of range 3 east, which said dam is indicated on the map, "Exhibit A," by two parallel red lines enclosing the word "dam."

That said first-mentioned dam has been constructed by said defendant by driving two lines of piling across the channel of said river and by throwing in between said lines of piling brush, tree tops, and other refuse matter and casting upon the same large rocks stone, and dirt, thus forming a tight and impenetrable obstruction and barrier to the waters of said river, and said dam has
18 caused the waters of said river to be diverted from their course and to make for themselves a new channel.

That the second dam above mentioned is constructed in the same manner as the first-mentioned dam, and was constructed for the purpose of diverting the said waters from forcing a passage at the point where said dam is constructed and overflowing the said island called the "Boot," and thereby again filling the channel of said river in said Commencement bay.

That all of the said lands hereinbefore described and belonging to affiant are situated between the lines of ordinary high water and ordinary low water of Commencement bay, an arm of the sea, where the tide ebbs and flows.

That that portion of the said premises marked "Joab" it is plaintiff's intention to wharf over and to construct thereon warehouses and other buildings at which ocean steamers and other vessels and local craft may receive and discharge their cargoes, and said premises can be made easily adaptable to said uses by reason of the fact that the channel made by the waters of said Puyallup river renders it possible for steamers of light draft to land at said premises at all stages of the tide, and that said channel can be made capable of receiving vessels of great draft at all stages of the tide at comparatively small expense.

That the lands marked "Mann and Manning" on said map "Exhibit A" it is the intention of affiant to enclose with piles and to make a tight enclosure around the same to a hight sufficient to

prevent the waters of Commencement bay from entering said land and to then fill in said enclosure with earth, rock, and other
19 filling matter, thereby making solid ground upon which warehouses and other structures may be erected for commercial purposes.

That the defendant, without any claim or color of title to any of said lands against affiant or against any person whatever, has constructed a double line of piling parallel with and about 200 feet from the mainland on which the city of Tacoma is situated; which said line of piling is indicated by two lined of red ink on said map, "Exhibit A," and marked by the word "piling."

That said line of piling extends through lands of affiant marked "Joab" and is constructed so that the channel made by the waters of said Puyallup river is between said line of piling and the main land.

That the said defendant has commenced to fill in between said lines of piling with brush and with sacks filled with dirt and will unless restrained fill in the entire length of said lines of piling.

That to the south of affiant's lands the said defendant is using a steam dredger for the purpose of constructing a channel along said line of piling, and the mud taken from said channel is being thrown between said line of piling and the mainland for the purpose of filling in the same, and the defendant threatens and unless restrained will construct a channels through said lands of affiant and cast the mud raised therefrom between said lines of piling and the mainland into the channel made by the waters of said Puyallup river.

That defendant threatens to cut a channel 300 feet wide and not less than — feet in depth from what has now since the waters
20 of said Puyallup river have been diverted *because* the mouth of the waters of said Puyallup river directly north and through the lands of affiant marked "Mann" and "Manning" on said map, "Exhibit A."

That defendant neither has nor claims any title in and to said lands against affiant or against any other person whatever, and unless restrained defendant will enter upon said lands of said affiant and construct said channel, thereby taking from the lands of affiant large quantities of mud, and in addition thereto the action of said river will also carry away large quantities of mud from said lands of affiant.

That previous to the location of said first-mentioned dam the course of said Puyallup river at its mouth is indicated by the word "river" marked on a photograph filed herewith and marked "Exhibit B" and by reference made a part of this affidavit.

That the course of said Puyallup river between its banks and its mouth before the construction of said first-mentioned dam is indicated by the word "river" on a photograph filed herewith and marked "Exhibit C" and made a part hereof.

That since the construction of said dam the waters do not run as represented on either Exhibit B or C, but pass to the rear of the

saw-mill building, which building is indicated on Exhibit "C" by the word "saw-mill."

That the course of said river when said channel shall have been constructed by the defendant across the lands of affiant is indicated by a line of piling on a photograph marked Exhibit "D" and hereby referred to and by such reference made a part hereof
21 and filed herewith. Said line of piling is marked by the word "piling," and the lands of plaintiff are marked on said "Exhibit D" by the words "Mann and Manning."

That said location is only approximate, but is as near as the same can be located on said photograph.

That said affiant has, by the construction of said line of piling across his premises, indicated on said Exhibit "A" by the word "Joab," and by the closing of said channel and the diverting of the waters of the said Puyallup river by the defendant, — in the sum of at least ten thousand dollars, and that if defendant is not restrained from carrying out its design that affiant's damage cannot be estimated, but will be at least one hundred thousand dollars.

JACOB C. MANN.

Subscribed and sworn to before me this 11th day of July, 1890.

M. L. CLIFFORD,
United States Commissioner.

22 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant.

Affidavit of L. G. Bigelow, in Support of Petition for Injunction.

UNITED STATES OF AMERICA,
District of Washington, } *ss:*

L. G. Bigelow, being first duly sworn, on his oath says he is a resident of the city of Tacoma; that he is acquainted with the situation of the tide lands in Commencement bay; that he knew the course of the Puyallup river prior to the time of the location of the dam across said river mentioned in the affidavit of Jacob C. Mann; that the course of said river was northwesterly and westerly, and near its mouth, between the mainland and the small island commonly known as the "Boot," the said Puyallup river, after it left its banks, continued this course westerly toward the said city of Tacoma, in the path indicated by Jacob C. Mann in his affidavit and marked on the map "Exhibit A," referred to in said affidavit; that the channel made by the said river was close to the mainland and is within the line of piling now being constructed by the defendant along the shore line in front of the city of Tacoma; that since affiant has
23 known said Puyallup river the defendant has constructed across the channel of said river from the southeasterly extremity of the "Boot" to the mainland a tight and impenetrable dam

made by depositing brush, tree tops, rocks, and stone dirt, and other refused matter between the lands of piling; that by reason of the construction of said dam the waters of the said Puyallup river have been diverted from their accustomed channel so that they now flow almost due north; that, in addition to said last-mentioned dam, the defendant has also constructed a second dam, extending from the southern extremity of the small island situated just to the north of said "Boot;" that said dam is constructed in the same manner as the first-mentioned dam; that by reason of the construction of said mentioned dams the waters of the Puyallup river have been drawn due north and now overflow the tide lands designated on said map "Exhibit A" by the words "Mud flats bare at low water."

That affiant hereby adopts the exhibits filed herein by Jacob C. Mann and begs leave to refer to the same for the purpose of explaining this affidavit.

That prior to the location of the dam across the channel of the Puyallup river the said river flowed as is indicated on Exhibits B and C, referred to by Jacob C. Mann in the affidavit filed herein; that since the construction of said dam the waters of said Puyallup river do not flow in their channel at all, and that the said channel is dry, except when the waters of Commencement bay back into the said channel at high tide; that prior to the location of sa-d *of said*
24 dam across the said Puyallup river the channel into which the waters of said river have now been forced by reason of the erection of said dam was merely a slough, dry at low tide, and into which, at high tide, the waters of Commencement bay were backed.

That since the waters of said Puyallup river have been diverted they have forced themselves into the little sloughs in said tide flats and have become spread over the said flats without having any well-defined channel; that since the erection of said dam and the overflowing of said waters of said river as aforesaid the said waters have undermined the piling and the wharf situated at the end of the line of piling, marked on "Exhibit D," and a large quantity of freight located on said wharf was precipitated into the waters of Commencement bay.

That the said Puyallup river has a strong current, and, for the purpose of leading the waters of said river into the waters of Commencement bay, so that the balance of the tide lands of said bay can be reclaimed, the defendant intends to cut a deep channel due north through the present outlet of the waters of said Puyallup river through the lands of the plaintiff in this action, marked "Mann" and "Manning" on Exhibit D, and also on Exhibit A, so that the mouth of said river at low tide will be at the end of said line of piling.

That said channel is to be 300 feet wide, and, in order to make the same, the defendant intends to use steam dredgers; that the defendant has steam dredgers that work at a number of places at the head of Commencement bay, and is working the same by day and by night, and is employing a large number of men on said work.

25 That the said company proposes to fill in and reclaim all the tide lands of Commencement bay, and, in pursuance of this general design, has entered upon the lands of plaintiff and is threatening to cut said channel through the same so that the *the* balance of said tide lands may be free from the action of the waters of said Puyallup river; that affiant believes that the construction of said channel through the lands of plaintiff and the damming of said Puyallup river and the diverting of the waters of said river from their accustomed channel and filling in the same will practically destroy the lands of plaintiff for commercial purposes, and that unless the said defendant is immediately restrained that irreparable damage will be done to plaintiff.

L. G. BIGLOW.

Subscribed and sworn to before me this 12th day of July, 1890.

M. L. CLIFFORD,
United States Commissioner.

26 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant, *vs.* THE TACOMA LAND COMPANY, a Corporation, Defendant.	Affidavit of Albert H. Lindsey, in Support of Petition for Injunction.

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

Albert H. Lindsey, being first duly sworn, on his oath says that he is a resident of Tacoma and is a civil engineer by profession; that he has been on the tide lands at the head of Commencement bay, and is well acquainted with the location of a certain dam across the channel of the Puyallup river, from the southern extremity of the island called the "Boot" to the mainland; that affiant was at the place where said dam now is before its erection; that at that time the waters of the Puyallup river flowed as designated on the Exhibits A, B, and C, filed with the affidavit of Jacob C. Mann; that at that time the channel into which the waters of the said Puyallup river have forced themselves since the erection of said dam was only a small slough or back water, and at low tide was bare;
27 that affiant has seen said dam since its construction entirely across the channel of said Puyallup river and is made by sinking piles at the distance of from 4 to 5 feet apart, between which brush, tree tops, rocks, earth, and bags filled with sand have been lodged; that said dam is absolutely tight and impervious to the action of the waters of the said Puyallup river, and between said dam and the city of Tacoma the channel is absolutely dry; that the waters of said river since the erection *od* said dam have been forced to the north and now run through the various sloughs intersecting said tide flats northerly to the waters of Commencement *B* bay; that the natural channel for the waters of said Puyallup river is

well defined and is indicated on Exhibits A? B, and C filed with the affidavit of Jacob C. Mann, and that the present outlet for the waters of said river is not the natural outlet and can only be made the outlet for said waters of said river by dredging a deep channel through the tide flats.

ALBERT H. LINDLEY.

Subscribed and sworn to before me this 12th day of July, 1890.

M. L. CLIFFORD,
United States Commissioner.

Endorsed: Affidavit of Jacob C. Mann, L. C. Biglow, and Albert H. Lindley. Filed July 12th, 1890. A. Reeves Ayres, clerk.

28 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant.

Now, on this 12th day of July, 1890, this cause coming on to be heard upon the application of complainant for a provisional restraining order restraining the said defendant, its officers, agents, attorneys, and employees, from doing any act tending to change the channel of the Puyallup river as it has formerly existed, having a northwesterly course through section three, township 21 N., of range three E., W. M., and a northwesterly course through section 4, t'p 20, R. 3 E., W. M., at the head of Commencement bay, in Pierce county, Washington, and from driving any piles or excavating any earth or mud upon or from the following lands: Commencing at a point 3,960 feet W. of S. E. corner of sec. 34, t'p 21 W., of R. 3 E., W. M., thence north 1,320 ft., thence west 1,320 feet, thence south 1,320 feet, thence east 1,320 feet to beginning; also the following premised: Com. at a point 80 chains east and 20 chains north of the S. E. corner of sec. 32, t'p 21 No., R. 3 E., W. M., thence west 20 chains, thence north — chains, thence south 20 chains, thence west 20 chains to place of beginning; and defendant shall show cause why it should not be restrained from committing any act upon said premises whatever. It is ordered by the court that the de-
29 fendant be cited to be and appear before the said court on the 16th day of July, 1890, at 10 o'clock a. m., to show cause why such restraining and provisional orders should not be granted, and the clerk of said court is directed to issue process is accordance herewith.

C. H. HANFORD, *Judge.*

Endorsed: Filed July 12th, 1890. A. Reeves Ayres, clerk.

In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant, *vs.* THE TACOMA LAND COMPANY, a Corporation, Defendant.	Amended Bill in Equity.

To the judges of the circuit court of the United States for the district of Washington:

Jacob C. Mann, of the city of Tacoma, county of Pierce and State of Washington, a citizen of the State of Washington, by leafe of court first obtained, brings this his amended bill against the Tacoma Land Company, a corporation created by and existing under the laws of the State of Pennsylvania and having its principal
30 place of business in the State of Washington, a citizen of the State of Pennsylvania; and thereupon your orator complains and alleges:

First.

That at all times hereinafter mentioned the defendant, The Tacoma Land Company, was and is a corporation created by and existing under the laws of the State of Pennsylvania.

Second.

That on the 29th day of October, 1889, the following-described premises were unoccupied and unappropriated lands of the United States, not mineral, and unsurveyed, to wit:

Commencing at a point which is three thousand nine hundred and sixty feet west of the southeast corner of section 34, in township 21 north, of range 3 east, of the Willamette meridian, running thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet to place of beginning, and containing forty acres.

Third.

That on the said 29th day of October, 1889, your orator, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, selected said tract of land as aforesaid described, at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office
31 certificate of location No. E 222 for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee, under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract, and on the 30th day of October, 1889, said selection was allowed and your orator re-

ceived from said register and receiver a certificate for said lands entitling your orator to a patent to said lands when the same should have been surveyed by authority of the Government of the United States.

Fourth.

That by virtue of said selection and certificate your orator is the owner of said described premises and entitled to the sole and exclusive possession of the same.

Fifth.

That on the 18th day of September, 1889, the following-described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point 80 chains east and 20 chains north of the southeast corner of section 32, township 21 north, of range 3 E., of the Willamette meridian; thence east 20 chains; thence north 20 chains; thence south 20 —; thence west 20 chains to the place of beginning and containing forty acres.

Sixth.

That on the 18th day of September, 1889, one Charles T. Manning under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," ap-
32 proved April 5th, 1872, selected said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. e. 111 for forty acres, issued by virtue of a decree of the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract, and on the 31st day of October, 1889, said selection was allowed, and said Manning received from said register and receiver a certificate for said lands entitling said Manning to a patent to said lands when the same should have been surveyed by the authority of the Government of the United States.

Seventh.

That by virtue of said selection and certificate the said Charles T. Manning became the owner of said described premises and entitled to the sole and exclusive possession of the same.

Eighth.

That your orator by conveyance from said Charles T. Manning and one Rosa L. Manning, wife of the said Charles T. Manning, became and is now the owner of said premises and entitled to all the right, title, and interest of said Charles T. Manning and Rosa L. Manning thereto.

Ninth.

That on the 18th day of September, 1889, the following-
33 described premises were unoccupied and unappropriated public lands of the United States, not mineral and unsurveyed, to wit:

Commencing at a point forty chains east of the northwest corner of section 4, township 20 north, of range 3 E., of the Willamette meridian, running thence south 22 and 80 one-hundredths chains, thence west 17 and one one-hundredths chains to the "Judson donation claim," thence with the meanders of said donation claim north six degrees west three and 85 one-hundredths chains, north fifteen degrees west ten chains, thence north ten and twelve one-hundredths chains to the 5th standard parallel, thence east 20 chains to the place of beginning.

Tenth.

That on the 18th day of September, 1889, one Albert E. Joab, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, selected said tract of land as aforesaid described at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. e. 273 for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract.

Eleventh.

That by virtue of said selection the said Albert E. Joab be-
34 came entitled to a patent to said lands when the same should have been surveyed by the authority of the Government of the United States, and became the owner of said premises and entitled to the sole and exclusive possession of the same.

Twelfth.

That your orator by conveyance from said Albert E. Joab has become and is now the owner and is entitled to all the right, title, and interest of the said Joab in and to said premises.

Thirteenth.

That the premises described in paragraphs 2nd and 5th of this amended bill adjoin each other, and if the survey of the United States Government were extended over said land would be the west half of the southwest quarter of section 34, township 21 north, of range 3 east, of the Willamette meridian.

Fourteenth.

That all the lands described in this amended bill are lands over which the tide ebbs and flows to a distance of 80 chains, and are what are designated on the plats and surveys of the United States as "mud flats bare at low water," and are overflowed at high water at a uniform depth of from 2 to 4 feet by the waters of Commencement bay, at the head of Puget sound, in Pierce county, State of Washington, and are situated about three-fourths of a mile from the line of low water of said Commencement bay and at the mouth of the stream known as "Puyallup river," and are valuable and suitable for the construction of wharves, warehouses, commercial purposes, and for agricultural uses.

Fifteenth.

That the Puyallup river is a navigable fresh-water stream, having a course northwesterly through section three and westwardly through section four, in said township twenty, and thence into the waters of Commencement bay westerly to the mainland and from thence north, hugging the shore line; that said river has a well-defined channel through which said river has been accustomed to flow from time immemorial into and through the waters of said Commencement bay; that near the mouth of said river there is an island lying, said sections 3 and 4, and being lot 2 of section 3 and lots 1 and 8 of section 4, said township, which is commonly known as the "Boot," and being the land pre-empted by one David Kelly, the southerly side of which islans forms a right bank of said Puyallup river.

Sixteenth.

That the defendant, for the purpose of diverting the waters of the said Puyallup river from the channel in which they have been accustomed to flow, has constructed a tight dam from the southeastern point of said island southerly to the mainland across the channel of said Puyallup river, and has also constructed a tight dam from the northerly side of lot 2 of section 3, township 20 north, of range 3 east, of the Willamette meridian of said island, near to and parallel with the section line dividing said sections 3 and 4, to the southerly point of the small island, being lot 5 of said section 3 and lot 9 of said section 4, lying north of said first-mentioned island, and has, without any claim or color of title to the last herein-described lands in paragraph 9 of this bill against your orator or against any other person whatever, entered upon said lands and is constructing
36 a line of piling parallel with and two hundred feet easterly from the shore line of section- 32 and 33, in township 21, and section 4, in township 20 north, of range 3 east, and across the premises described in paragraph ninth of this bill, and threatens and unless restrained will, by means of a steam dredger, tear up the mud and sand forming the surface of said premises described in paragraph ninth of this bill for a width of three hundred feet and not less than seventeen feet in depth along the entire length of said premises, and

will cast the said mud and earth between the said line of piling and the shore line of said sections 32 and 33, in township 21, and section 4, in township 20, and will fill up the said channel; that by means of said dam and embankments the waters of the Puyallup river have been diverted and forced from their course and thrown into a new channel running due north to the waters of Commencement bay.

Seventeenth.

That the defendant, without any claim or color of title to said lands against your orator or against any person whatever, has entered upon the lands described in paragraphs second and fifth of this amended bill and wilfully and without a shadow of right is proceeding to cut a deep channel or canal three hundred feet in width and no less than 17 ft. in depth from the section line dividing townships twenty and twenty-one north, of range three east, and extending northerly three hundred feet through the west half of the west half of section 34, in township 21 north, of range three east, of the Willamette meridian, described as commencing at a point three thousand nine hundred and sixty feet west of the southeast corner of section
34, township 21 north, of range three east, of the Willamette
37 meridian; thence north thirteen hundred and twenty feet; thence west thirteen hundred and twenty feet; thence south thirteen hundred and twenty feet; thence east thirteen hundred and twenty feet to place of beginning, and also at a point described as 80 chains east and twenty chains north of the southeast corner of section 32, in said township and range; thence north twenty chains; thence east twenty chains; thence south twenty chains; thence west twenty chains to place of beginning, with the design, purpose, and intention, when said channel shall have been completed through the lands aforesaid, of causing the waters of the said Puyallup river to so diverge as aforesaid from their usual and customary channel, and to lead said waters into the channel now being made as aforesaid.

Eighteenth.

That the making of said channels as aforesaid would permanently injure the said lands of complainant and would absolutely destroy that portion through which the channel is being made for the use and construction of wharves or other valuable improvements; that the waters of the Puyallup river, through the said acts of the defendant, will be let in upon the said lands of your orator and will permanently overflow the same; that they will not be useful for any valuable purpose whatever, and thereby great and irreparable injury will accrue to your orator.

Nineteenth.

That your orator intends filling in said lands aforesaid and erecting thereon warehouses and other buildings, over and across which lands general traffic may be carried on to and from the city of Tacoma.

38 Twentieth.

That the said Puyallup river has a swift and eddying current, and that since this defendant has diverted the waters of the said river from their course and by reason thereof certain wharves erected by parties other than your orator and in the line of the said river as it is now running—without any channel—have been by means of the action of the waters of said river undermined and large quantities of freight lying thereon have been discharged into the waters of Commencement bay, and your orator alleges that if defendant is not restrained from executing the design of digging such channels across such lands of complainant hereinbefore described and leading the waters of said river into said channel that it will be impossible to construct and maintain strong and safe wharves or docks on said lands or to fill in and reclaim the same, and the value of said lands will be permanently destroyed.

Twenty-first.

That by reason of the acts of the defendant already committed your orator has been damaged in the sum of ten thousand dollars ($10,000,00), and unless said defendant is restrained from executing its design as hereinbefore alleged your orator will suffer damage in the sum of at least one hundred thousand dollars.

Wherefore your orator prays that the defendant may be restrained from any further violation of such rights, and that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court perpetually injoining and restraining the defendant, their officers, attorneys, agents, servants, and workmen, from any further construction of said piling and of said channels,

39 and that your honors upon the rendering of the decree above prayed may assess or cause to be assessed the damages your orator has sustained by reason of said erection and the construction of said dams, embankments, and filling and the digging of such channels; and your orator further prays that said dams, embankments, piling, and other erections by means of which the waters of said Puyallup river have become diverted from their course may be demolished; and your orator further prays that a provisional and preliminary injunction may be issued restraining the said defendant from continuing the construction of said piling, embankments, and dams and dredging and cutting of channels through the lands of your orator or through any other lands, by means of which the waters of said Puyallup river may be diverted from their course and thrown into and upon the lands of your orator, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator a writ of injunction conformable to the prayers of this bill and to issue a writ of subpœna of the United States of America, directed to the said Tacoma Land Company, its officers, attorneys, agents, servants, and workmen, commanding it on a day certain to appear and answer under this bill and to abide and perform such order and decree in

the premises as to the court may seem proper and required by the principles of equity and good conscience.

JUDSON, SHARPSTEIN & SULLIVAN,
Solicitors for Complainant.

40 UNITED STATES OF AMERICA, }
District of Washington, } *ss:*

On this the 21st day of July, 1890, before me personally appeared Jacob C. Mann, the complainant above named, who, being by me duly affirmed, deposes and says—

That he has read the foregoing bill of complaint and knows the contents thereof, and that the same are true to his knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JACOB C. MANN.

Affirmed and subscribed before me this 20*st* day of July, 1890.

E. W. TAYLOR,
Notary Public, Residing at Tacoma, [SEAL.]
Pierce County, Washington.

Endorsed: Amended bill. Filed July 22nd, 1890. A. Reeves Ayres, clerk U. S. circuit court.

41 In the Circuit Court of the United States for the District of Washington, Ninth Judicial District.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant. } Order.

This cause coming on to be heard this 20th day of July, eighteen hundred ninety, upon the bill of complaint and affidavits of Jacob C. Mann, L. G. Biglow, and Albert Lindsley, made and filed herein, and upon the counter-affidavits filed on behalf of the defendant upon the application of the complainant for a writ of injunction to restrain the defendant, its officers, attorneys, agents, servants, and workmen, from any further construction of the piling upon the land in the bill mentioned and described or from the further doing the acts complained of in the said bill, and the court, after hearing the argument of the counsel of the complainant and the defendant and being fully advised in the matter, refuses to grant the complainant a restraining order as prayed for in his complaint.

And to the ruling of the court in refusing to grant said order the said complainant excepts, and his *acception* is allowed by the court.

C. H. HANFORD,
District Judge.

Endorsed: Filed August 20, 1890. A. Reeves Ayres, clerk.

42 In the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant.

The defendant demurrs to the amended bill of complaint herein upon the grounds that the said amended bill of complaint does not state facts sufficient to constitute a cause of action or to support a bill in equity.

CAMPBELL & POWELL,
Attorneys for Defendant.

Service of a copy of the above received this 1st day of October, 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Solicitors for Complainant.

This is to certify that I, Lewis D. Campbell, am an attorney of this court and one of the attorneys for the above-named defendant; that I am of opinion that the above demurrer is well founded in point of law.

LEWIS D. CAMPBELL.

43 STATE OF WASHINGTON, *County of Pierce,* } *ss:*

Isaac W. Anderson, being duly sworn according to law, on oath says that he is the agent and attorney-in-fact of the Tacoma Land Company; that the said company is a corporation created by and existing under the laws of the State of Pennsylvania; that affiant is the only officer of said company in this State who is qualified to make this affidavit; that affiant has read the foregoing demurrer and knows the contents thereof and believes the same to be true. Affiant, on oath, further says that the said demurrer is not interposed for the purpose of delay.

ISAAC W. ANDERSON.

Sworn to *be* and subscribed before me this 22nd day of October, 1890.

E. R. YORK,
[SEAL.] *Notary Public, Residing at Tacoma, State of Washington.*

Endorsed: Filed October 2nd, 1890. A. Reeves Ayres, clerk.

44 United States Circuit Court, Western Division, District of Washington.

JACOB C. MANN, Plaintiff,
vs.
THE TACOMA LAND COMPANY. } Opinion. Filed October 22nd, 1890.

Syllabus by the Court.

Surveys, public lands.—Under the land laws of the United States the line of ordinary high tide on the shore of an arm of the sea is the boundary between the land and the water and the line at which the surveys of the public lands of the United States terminate.

Statute, Valentine scrip, tide land.—The act of Congress providing for the issuance of Valentine scrip and for its location upon unoccupied and unappropriated public land cannot be so construed as to authorize the entry with said scrip of mud flats bare at low tide, but subject to daily overflow, situated in one of the harbors of a Territory, and which has been omitted from the surveys made of the public lands surrounding such harbor.

This case has been submitted upon a demurrer to the plaintiff's amended bill. The plaintiff, claiming to own three separate forty-acre tracts of the mud flats in Tacoma harbor, brings this suit for an injunction to prevent the defendant from proceeding further with certain harbor improvements it is making in front of
45 land it owns abutting upon the shore, which the bill alleges will interfere with plaintiff in the possession and use of the premises which he claims to own. The bill shows that said premises are what *what* is commonly known as tide lands or mud flats, and are situated below the line of ordinary high tide; that they are bare at ordinary low tide, but subject to overflow daily, and are not within the surveys of the public lands of the United States.

That the plaintiff's claim of title is based upon the location thereon of certain land scrip called "Valentine scrip." The plaintiff and his vendors were owners of the scrip*t*, and they located the same and filed the proper certificate*d* and declarations in the United States land office at Seattle, on October 30th, 1889, which time was prior to the Presidence proclamation making complete the admission into the Union of this State, but subsequent to all the acts of legislation and proceedings leading up to that event.

In deciding this case I shall leave untouched the interesting question as to the power of Congress to dispose of tide lands in a Territory and most of the many other important questions which have been discussed in the very able arguments made before me, my opinion being such that it is unnecessary for me to do more than pass upon the single question as to validity of the plaintiff's claim of title, and a single reason for my opinion upon that question is all that need be given.

The "Valentine scrip" was issued pursuant to the act of Congress

of April 5th, 1872 (17 Statutes U. S., 649), for the relief of
46 Thomas B. Valentine, authorizing scrip to be issued to him and authorizing him or his legal representatives to locate such scrip upon such "unoccupied and unappropriated public lands of the United States," whether surveyed or unsurveyed, as he or his legal representatives might select.

The act provided further that such selection should be made, if on unsurveyed land, so as to conform to the Government surveys when the land should be surveyed and in tracts of not less than forty acres.

This statute authorizes the location and entry of lands which at the time of entry either has been or remains to be surveyed and included in the public surveys of the township according to the established and known rules governing the land surveys of the United States; and, obviously, it was not intended by Congress to give Mr. Valentine, his representatives or vendors, any right to acquire title by use of such scrip to any part of a navigable river, channel, or harbor or the bed or shore thereof situated outside the limits, subject to survey according to established rules.

As part of a general plan and system for the sale and disposition of the lands of the United States the laws provide for surveys to be made and officers specially qualified to do that work and charged with official responsibility are assigned to the duty of subdividing the land and locating and establishing boundaries. The lands surrounding this harbor have been by such officers surveyed and the boundary line between the land and the water of the bay has been by this official survey located and established.

47 That line is approximately the line of ordinary high tide, which, according to all the laws and usages of this country, is the boundary line dividing the land and the water and the limit to which the surveys may lawfully extend. The space which the plaintiff seeks to protect is not surveyed as land and remains unsurveyed because situated outside of this boundary, and it was regarded by the official surveyor as being not land at all, but as water.

The work of the surveyors in the field with their plates and field-notes has been approved by the Commissioner of the General Land Office, and it is, as to all matters relating to the sale in this position of the lands of the United States, conclusive and binding upon all persons having to deal with the United States as well as upon the Government itself. (Bates *vs.* Illinois C. R. Co., 1 Black, 204.) Therefore, in my opinion, the plaintiff could acquir*t* no title or right to the premises he claims by the proceedings in the land office, and he cannot lawfully maintain this suit. The demurrer will be sustained and a decree dismissing the bill, with costs, will be entered.

C. H. HANFORD,
United States District Judge.

Judson, Sharpstein & Sullivan and P. H. Winston, for plaintiff; Lewis D. Campbell, for defendant.

Endorsed: Opinion. Filed October 22nd, 1890. A. Reeves Ayres, clerk.

48 UNITED STATES OF AMERICA, *District of Washington*, } ss:

Be it remembered that at the regular July term, A. D. 1890, of the United States circuit court for the district of Washington, western division, begun and holden at the city of Tacoma—present, Honorable C. H. Hanford, United States district judge for the district of Washington, presiding by direction of the Honorable Lorenzo Sawyer, United States district judge for the ninth judicial circuit—among other, the following proceedings were had, to wit:

WEDNESDAY, *October 22nd*, 1890.

JACOB C. MANN, Plaintiff,
vs.
THE TACOMA LAND COMPANY, Defendant.

Now, on this 22nd day of October, A. D. 1890, this cause coming on for hearing on the demurrer to the amended complaint herein and the court, having heard the arguments — the attorneys and solicitors for the complainant and defendant and being fully advised in the matter, sustaunes the demurrer; and it is now ordered, adjudged, and decreed that the demurrer be sustained, and that the bill of complaint be dismissed, and that the defendant have and recover from the complainant thirty-four and $\frac{41}{100}$ dollars, its costs.

C. H. HANFORD,
District Judge.

Endorsed: Judgment on demurrer.

49 JACOB MANN, Plaintiff,
vs.
THE TACOMA LAND COMPANY, Defendant.

The above-named plaintiff, conceiving himself *agrees* by the order entered herein on the 22nd day of October, A. D. 1890, in the above proceeding, doth hereby appeal from said order to the Supreme Court of the United States and prays that this his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said Supreme Court of the United States.

JUDSON, SHARPSTEIN & SULLIVAN, AND
PATRICK H. WINSTON,
Attorneys for Plaintiff and Appellant.

Endorsed: Notice of appeal.

TACOMA, WASHINGTON, *October 22nd*, 1890.

And now, to wit, on October 22nd, 1890, in open court, it is ordered that the appeal be allowed as prayed for.

C. H. HANFORD,
District Judge.

Endorsed: Order allowing appeal.

50 JACOB C. MANN, Plaintiff,
vs.
THE TACOMA LAND COMPANY, Defendant.

And now, on this 22nd day of October, A. D. 1890, it is ordered that the appeal bond herein be, and the same is hereby, fixed in the sum of two thousand ($2,000.00) dollars.

C. H. HANFORD,
District Judge.

Endorsed: Order fixing bond.

JACOB C. MANN, Plaintiff,
vs.
THE TACOMA LAND COMPANY, Defendant.

And now, on this 3rd day of November, A. D. 1890, the appeal bond in this cause is duly presented and approved in open court.

C. H. HANFORD,
District Judge.

Endorsed: Order approving appeal.

51 In the Circuit Court of the United States, District of Washington, Western Division, Ninth Judicial Circuit.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Washington, County of Pierce, } *ss:*

Know all men by these presents that we, Jacob C. Mann, as principal, and J. B. Catron and D. Whitmore, residents of the State of Washington, as sureties, are hereby held and firmly bound unto the defendant above named, The Tacoma Land Company, in the penal sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, and assigns. The condition of this obligation is such that—

Whereas, at the regular July, 1890, term of the above-named court, holden by the Honorable C. H. Hanford, judge of said court, in Tacoma, in said district, and sitting on the 22nd day of October, 1890, the said plaintiff at said time, in open court, duly gave notice of appeal to the Supreme Court of the United States from the final decree theretofore rendered in said cause, dismissing complainant's bill; and whereas the said notice of appeal was made
52 as aforesaid and was allowed by the court; and whereas the said Honorable C. H. Hanford, the judge of said court granting such appeal, fixed the amount of bond to be given by complainant upon said appeal in the sum of one thousand dollars:

Now, therefore, if the said complainant shall prosecute his said appeal to effect and shall answer all costs which may be decreed against him by the said Supreme Court and shall answer all

damages and costs if he fail to make his pleas good, this bond shall be void and of no effect; otherwise it shall be and remain in full force.

In witness whereof we have hereunto set our hands and seals this 29th day of October, 1890.

JACOB C. MANN AND [SEAL.]
J. B. CATRON. [SEAL.]
D. WHITMORE. [SEAL.]

Witnessed by—
P. C. SULLIVAN.

UNITED STATES OF AMERICA, } ss:
District of Washington, County of Pierce, }

We, J. B. Catron and D. Whitmore, being first severally duly sworn, each for himself says that he is the identical person who executed the foregoing bond; that he is a resident of the State of Washington and is worth the sum specified in said bond as the penalty thereof, to wit, the sum of one thousand dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

J. B. CATRON AND D. WHITMORE.

53 Subscribed and sworn to before me, a notary public in and for the State of Washington, this 29th day of October, A. D. 1890.

[SEAL.] C. A. WATROUS,
Notary Public, Residing at Tacoma, Pierce Co., Washington.

The foregoing bond, with all interlineations, acknowledged by the above-named sureties before me this the 3rd day, 1890.

A. REEVES AYRES,
Clerk U. S. Circuit Court.

Endorsed: Approved by me this 3rd day of November, 1890. C. H. Hanford, U. S. district judge.

54 UNITED STATES OF AMERICA, } ss:
District of Washington, }

Be it remembered that at the regular July term, A. D. 1890, of the United States circuit court for the district of Washington, western division, begun and holden at the city of Tacoma—present, Honorable C. H. Hanford, United States district judge for the district of Washington, presiding by direction of the Honorable Lorenzo Sawyer, United States circuit judge for the ninth judicial circuit—among other, the following proceedings were had, to wit:

WEDNESDAY, *November 19th*, 1890.

JACOB C. MANN, Complainant,
vs.
THE TACOMA LAND COMPANY, a Corporation, Defendant. } Case —.

Now, on this 19th day of November, 1890, comes the complainant, Jacob C. Mann, by his attorneys, Judson, Sharpstein and Sullivan, and asks leave of the court in open court to file the two certificates of location referred to in said complaint as having been issued by the register and receiver of the land office, situated at the county of King, in the city of Seattle, Washington, one to Jacob C. Mann and the other to one Charles T. Manning, bearing date, the first mentioned, October 30th, 1889; the second mentioned, October 31st, 1889, and are herein marked Exhibits One and Two respectively, and complainant further asks that said certificate- be made a part of the record in said cause. It is ordered that said complainant be
55 allowed to file the said certificate-, and upon such filing that they become a part of the record in said cause.

Endorsed: Order allowing exhibits to be filed. Filed November 19th, 1890. A. Reeves Ayres, clerk.

Duplicate. R. & R. No. 33.

UNITED STATES LAND OFFICE,
SEATTLE, W. T., *October 30th*, 1889.

I hereby certify that certificate of location No. E 222, for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States on the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee under the act of Congress, approved April 5th, 1872, entitled "An act for the relief of Thomas B. Valentine," has, on the 29th day of October, 1889, been filed in this office by Jacob C. Mann on the following-described tract of unsurveyed land, to wit: Commencing at a point which is three thousand nine hundred and sixty feet west of the southeast corner of section 34, township 21 north, range 3 east, thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet to the place of beginning, said land being in the southwest quarter of the southwest quarter of section 34, township 21 north, range 3 east, Willamette
56 meridian, Washington Territory, and containing forty acres, to conform, when surveyed, to the general system of the United States survey.

T. M. REED, JR., *Register.*

Received this 30th of October, 1889, the sum of one dollar in payment of register'- and receiver's fee in filing the above-mentioned certificate.

JAS. R. HAYDEN, *Receiver.*

Allowed under Commissioner's decision "A," Sept. 6, 1889, and telegram October 12, 1889.

Endorsed: 40769. Filed for record, at the request of W. C. Hill, Oct. 30, A. D. 1889, 20 min. past 2 p. m., and recorded in vol. one of Patents, page 454, records of King county, W. T. W. R. Forrest, Co. auditor. 75 cts. p'd.

57 R. & R. No. 36.

UNITED STATES LAND OFFICE,
SEATTLE, W. T., *October* 31, 1889.

I hereby certify that certificate of location E No. 111, for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine or his legal assignee, under the act of Congress approved April 5th, 1872, entitled "An act for the relief of Thomas B. Valentine," has, on the 18th day of September, 1889, baan filed in this office by Charles T. Manning on the following-described tract of unsurveyed land, to wit: Beginning at a point eighty (80) chains east and twenty (20) chains north of the southeast corner of section 32, township 21 north, of range 3 east, Willamette meridian, thence north twenty (20) chains, thence east twenty (20) chains, thence south twenty (20) chains, thence west twenty (20) chains to place of beginning, which will, when surveyed, be the northwest quarter of the southwest quarter of section 34, township 21 north, of range 3 east, Willamette meridian, W. T., and containing forty acres, to conform, when surveyed, to the general system of the United States survey.

T. M. REED, JR., *Register.*

Received this 31st day of October, 1889, the sum of one dollar in payment of register's and receiver's fee for filing the above mentioned certificate.

JAS. R. HAYDEN, *Receiver.*

Allowed under Commissioner's decision "A," Sept. 6, 1889, and telegram Oct. 12, 1889.

Endorsed: 40830. Chas. T. Manning. Filed for record at the request of Beath Brown, Jr., Oct. 31, A. D. 1889, at 10 min. past 11 a. m., and recorded in vol. one of Patents, page 457, records of King Co., W. T. W. R. Forrest, county auditor. 75 cts. pd.

58 *Certificate.*

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

I, A. Reeves Ayres, clerk of the United States circuit court for the district of Washington, do hereby certify the writing hereto attached to be a true transcript of the record, proceedings, and exhibits in case No. 31 of Jacob C. Mann, complainant, against The Tacoma

Land Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Tacoma, in said district, this 2nd day of December, in the year of our Lord eighteen hundred and ninety.

Seal of the United States Circuit Court, District of Washington.

A. REEVES AYRES, *Clerk.*

[Endorsed:] Case No. 31. In the circuit court of the United States, ninth judicial circuit, district of Washington. Jacob C. Mann *vs.* The Tacoma Land Co. Filed —— —, 18—. ——— ———, clerk, by ——— ———, deputy clerk. Copy of transcript for Mr. McPherson. Original to be filed with clerk U. S. Supreme Court.

Endorsed on cover: Case No. 14,465. Washington C. C. U. S. No. 639. Jacob C. Mann, appellant, *vs.* The Tacoma Land Company. Filed January 27, 1891.

Supreme Court of the United States.

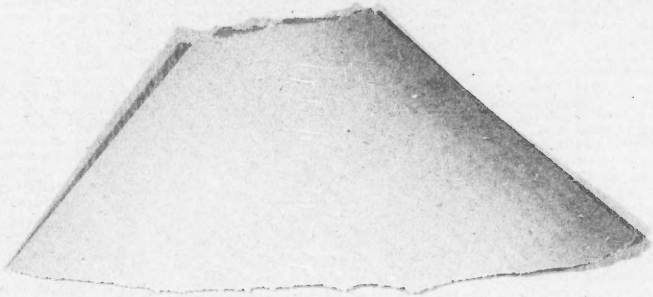
OCTOBER TERM, 1891.

JACOB C. MANN, Appellant,
vs.
THE TACOMA LAND CO. } No. 1012.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

MOTION TO ADVANCE.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

JACOB C. MANN, Appellant,
vs.
THE TACOMA LAND CO.
No. 1012.

Motion to Advance.

The complainant, Mann, moves the court to advance this cause, and set it down for argument at an early convenient day, and respectfully shows to the court the following "special and peculiar reasons" as the grounds of this motion.

The question presented in this cause is the right to locate "Valentine scrip" (17 Stats., 649) upon lands over which the tide ebbs and flows. Complainant's said scrip is located upon such land, between the high and low water marks of Commencement Bay, in Pierce County, now State of Washington, but at the time of the allowance of complainant's entry thereof Washington had not been admitted into the Union. This land is about three-quarters of a mile from the low-water mark of the bay and is covered to a uniform depth of from two to four feet (according to the run of the tides) at high water, and is entirely bare at low water, being marked upon the coast survey maps as "mud flats; bare at low water." Said lands are very valuable and, by levees or filling, can be made available and useful for agricultural or business purposes. As stated in the complaint, and admitted by demurrer, the injury already inflicted by defendant upon this land is $10,000, and a continuance of its operations thereon will inflict an irreparable injury of

$100,000. The *sole* question determined below was plaintiff's right so to locate his scrip (see 44 Fed. Rep., 27), and it is presented by demurrer as purely one of law. The right is asserted by complainant as a grantee of the United States, and is contested by defendant (*inter alia*) as infringing sovereign rights of the State of Washington. (*Ib.*)

It is the same as that presented in No. 1364 of the current term (Yesler *v.* Board of Harbor Line Comr. *et al.*) *already advanced* and set for the second Monday of next term. These causes ought to be so argued as to be determined by this court at the same time.

Thus this appeal involves considerations of the gravest public character, affecting important interests and conflicting claims of the State and Nation. An injunction is prayed to prevent the unauthorized diversion of the waters of the Puyallup River, and the determination of the question where the right exists to prevent such diversion and the injury to and destruction of such lands as those described in complainant's bill, should be speedily and definitely determined.

By the refusal of the injunction prayed for, and the dismissal of his bill, the complainant will be irremediably injured, and the subject of litigation destroyed, if this cause is compelled to await, for three or four years, its turn in the regular call of causes upon the docket.

The reasons for advancing this cause are those which usually entitle a case to preference under State codes and for which mandamus petitions are here advanced.

Wherefore complainant prays that his said cause and appeal may be advanced.

T. H. N. McPherson,
Edwin B. Smith,
Of Counsel for Appellant.

The defendant in error unites in this motion to advance the cause above mentioned.

Sam'l. Dixon,
For Tacoma Land Co.

Office Supreme Court U. S.
FILED.
APR 18 1893
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.

JACOB C. MANN, Appellant,
vs.
THE TACOMA LAND CO. } No. 639.

Appeal from the Circuit Court of the United States for the District of Washington.

Motion to Advance.

The complainant, Mann, moves the court to advance this cause, and set it down for argument at an early convenient day (at the commencement of next term, if impracticable at this stage of the current term), and respectfully shows to the court the following "special and peculiar reasons" as the grounds of this motion.

The question presented in this cause is the right to locate "Valentine scrip" (17 Stats., 649) upon lands over which the tide ebbs and flows. Complainant's said scrip is located upon such land, between the high and low water marks of Commencement Bay, in Pierce County, now State of Washington, but at the time of the allowance of complainant's entry thereof Washington had not been admitted into the Union. This land is about three-

quarters of a mile from the low-water mark of the bay, and is covered to a uniform depth of from two to four feet (according to the run of the tides) at high water, and is entirely bare at low water, being marked upon the coast survey maps as "mud flats; bare at low water." Said lands are very valuable, and by levees or filling can be made available and useful for agricultural or business purposes. As stated in the complaint, and admitted by demurrer, the injury already inflicted by defendant upon this land is $10,000, and a continuance of its operations thereon will inflict an irreparable injury of $100,000. The *sole* question determined below was plaintiff's right so to locate his scrip (see 44 Fed. Rep., 27), and it is presented by demurrer as purely one of law. The right is asserted by complainant as a grantee of the United States, and is contested by defendant (*inter alia*) as infringing sovereign rights of the State of Washington. (*Ib.*)

The State of Washington, through its Governor and Attorney-General, has signified its concurrence in this motion, and its desire to have this cause advanced for reasons affecting that State and its interests.

Thus this appeal involves considerations of the gravest public character, affecting important interests and conflicting claims of the State and Nation. An injunction is prayed to prevent the unauthorized diversion of the waters of the Puyallup River, and the determination of the question where the right exists to prevent such diversion and the injury to and destruction of such lands as those described in complainant's bill, should be speedily and definitely determined.

By the refusal of the injunction prayed for, and the dismissal of his bill, the complainant will be irremediably injured, and the subject of litigation destroyed, if this cause is compelled to await, for three or four years, its turn in the regular call of causes upon the docket.

The reasons for advancing this cause are those which usually entitle a case to preference under State codes and for which mandamus petitions are here advanced.

Wherefore complainant prays that his said cause and appeal may be advanced.

THEODORE H. N. MCPHERSON,
EDWIN B. SMITH,
Of Counsel for Appellant.

The defendant in error unites in this motion to advance the cause above mentioned.

SAM'L DIXON,
For Tacoma Land Co.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892.

JACOB C. MANN, Appellant,
vs.
THE TACOMA LAND COMPANY. } No. 639.

Comes now the State of Washington, by W. C. Jones, Attorney-General, who appears pursuant to instructions from the chief executive of this State, and moves the court for an order to advance said cause on the docket for a hearing at an early date, and also for leave to appear and participate in the argument of said cause.

This motion is based on the following facts:

First. The plaintiff herein claims title to a portion of the shores of the tide waters of the State of Washington by virtue of the location of Valentine Scrip thereon.

Second. The State of Washington claims to be the absolute owner of all the shores and beds of navigable waters within said State, and denies the right of any person to appropriate any portion of the same without the consent of the State.

Third. The State of Washington has enacted legislation looking to the disposition of so much of the shores of the tide waters of the State as may be disposed of without impairing the public rights of navigation therein; and the areas claimed by the plaintiff in this action lie within harbor lines heretofore laid out by the officers of said State in front of the city of Tacoma, and may be so disposed of.

Fourth. The pendency of this action in this court and the claim of the plaintiff made therein operate as an impediment to the proper and just execution of the laws of the State with reference to the shores of tide waters.

The reasons for the necessity of an early determination of this litigation are further set forth in the following letter from his Excellency, the Governor of the State of Washington:

"Hon. W. C. JONES, *Attorney-General.*

"SIR: My attention is called to the fact that there is now pending in the Supreme Court of the United States two cases involving the title to the shores and beds of the navigable waters of this State, viz., the case of Milton L. Baer *v.* Moran Bros. Co., a corporation, and the case of Mann *v.* The Tacoma Land and Improvement Co.

"As the entire area in dispute in these two cases is claimed by the State of Washington to be its absolute property, and the appellants in these two cases claim title to the property as against the State by virtue of the location of Valentine scrip thereon, I deem it important that these cases be disposed of at as early a date as practicable, so that the apparent cloud cast upon the State's title by these proceedings may be removed. This matter is the more important for the reason that it is likely that this property will be offered for sale by the State, pursuant to its laws relating to tide lands, and the pendency of these actions may by clouding the title prevent their sale for a fair and just sum.

"Yours truly,

"J. H. MCGRAW, *Governor.*"

Respectfully submitted.

W. C. JONES,
Attorney-General of the State of Washington.

Office Supreme Court, U. S.
FILED
APR 12 1894
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893

JACOB C. MANN

vs.

TACOMA LAND CO.

No. 875

APPELLANT'S BRIEF.

THEODORE H. N. McPHERSON,
EDWIN B. SMITH,
Of Counsel.

T. H. N. McPHERSON,
No. 1324 F St. N. W.,
Washington, D. C.,
Attorney.

C. G. Burgoyne, Walker and Centre Streets, New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

JACOB C. MANN vs. TACOMA LAND CO.	No. 639.

APPELLANT'S BRIEF.

Statement.

By his amended bill (Rec. pp. 16 to 22) Mr. Mann alleged that the Tacoma Land Company, a Pennsylvania corporation, without authority of law or a shadow of right *(Id.* 20*)* were committing a public nuisance, by damming up the regular, navigable channel of the Puyallup river and diverting its waters through a new course, which defendants were dredging for them, across the plaintiff's land, title whereto he had acquired in the manner set forth in this bill; whereby he suffered special damage, and would be subjected to irreparable injury, unless defendants were enjoined from further prosecution of their undertaking.

The defendant-corporation, by demurrer, admitted the truth of complainant's statement of their actions and intentions, conceding they had no authority in themselves for what they had done, and were proceed-

ing to do, in this behalf; and relied wholly upon the proposition that the plaintiff's title to the land, upon which they were committing and contemplating trespasses, was not sufficient to justify any enjoining, upon his application, of the nuisance of which the defendants confessed themselves guilty.

The question, in brief, then is this: Does the complainant's bill disclose in him, and as against the defendants, such title or color of title to, or interest in, the property with relation to which an admitted nuisance is being committed as to enable him to procure an injunction to restrain its continuance or further prosecution by the wrong-doers.

The amended bill, brought by Jacob C. Mann, a citizen of Tacoma, against the defendant, alleges that, on Sept. 18 and October 29, 1889, the orator and those to whose title he succeeded selected the described unoccupied and unappropriated parcels of public lands, (not mineral, and unsurveyed) which were, or were to be, certificated to him accordingly; whereby he became entitled to the sole and exclusive possession of the same.

The selection of these lands was by the location thereon of scrip issued to Thomas B. Valentine, under below-printed act of April 5, 1872. (17 Stats. 649.)

There were three "forties" located; the first of these, described in paragraph "Second" (Rec. 16) was selected Oct. 29, 1889, by Mr. Mann, at the proper land-office in Seattle, by certificate E222, issued by virtue of a decree of this court, rendered Jan. 6, 1874, under said statute; which selection was, on the following day, allowed to him; and he received from the land office a certificate entitling him to a patent therefor, and to the exclusive possession thereof. (Rec. 16, 17, Pars. "Third" and "Fourth.")

The second 'forty' was, in like manner selected by one Manning Sept. 18, 1889, and it was certificated

and allowed to him the last day of the following month; and that title was subsequently transferred to the complainant. *(Id.* 17; Pars. "fifth" to "eighth.")

The third "forty" was selected by one Albert E. Joab, Sept. 18, 1889, and he afterwards conveyed his right and title to Jacob C. Mann. *(Id.* 18; Pars. "ninth" to "twelfth.")

The parcels described in the second and fifth paragraphs (Rec. 16, 17) adjoin; and when surveyed will constitute the W. ½ of S. W. ¼, Sec. 34, T. 21 N., R. 3 E., Willamette meridian. *(Id.* 18 bottom.)

The remaining paragraphs of the bill it is thought best to quote *in extenso*;—

"FOURTEENTH.

"That all the lands described in this amended bill are lands over which the tide ebbs and flows to a distance of 80 chains, and are what are designated on the plats and surveys of the United State as "mud flats bare at low water," and are overflowed at high water at a uniform depth of from two to four feet by the waters of Commencement bay, at the head of Puget sound, in Pierce county, State of Washington, and are situated about three-fourths of a mile from the line of low water of said Commencement bay and at the mouth of the stream known as "Puyallup river," and are valuable and suitable for the construction of wharves, warehouses, commercial purposes, and for agricultural uses." (Rec. 19.)

"FIFTEENTH.

"That the Puyallup River is a navigable fresh-water stream, having a course northwesterly through section three, and westwardly through section four, in said township twenty, and thence into the waters of Commencement Bay westerly to the mainland and from thence north, hugging the shore line; that said river has a well-defined channel through which said river has been accustomed to flow from

time immemorial into and through the waters of said Commencement Bay; that near the mouth of said river there is an island lying in said sections 3 and 4, and being lot 2 of section 3 and lots 1 and 8 of section 4, said township, which is commonly known as the "Boot," and being the land pre-empted by one David Kelly, the southerly side of which island forms a right bank of said Puyallup River." *(Ib.)*

"SIXTEENTH.

"That the defendant, for the purpose of diverting the waters of the said Puyallup river from the channel in which they have been accustomed to flow, has constructed a tight dam from the southeastern point of said island southerly to the mainland across the channel of said Puyallup river, and has also constructed a tight dam from the northerly side of lot 2 of section 3, township 20 north, of range 3 east, of the Willamette meridian of said island, near to and parallel with the section line dividing said sections 3 and 4, to the southerly point of the small island, being lot 5 of said section 3 and lot 9 of said section 4, lying north of said first-mentioned island, and has, without any claim or color of title to the last herein-described lands in paragraph 9 of this bill against your orator or against any other person whatever, entered upon said lands and is constructing a line of piling parallel with and two hundred feet easterly from the shore line of sections 32 and 33, in township 21, and section 4, in township 20 north, of range 3 east, and across the premises described in paragraph ninth of this bill, and threatens and unless restrained will, by means of a steam dredger, tear up the mud and sand forming the surface of said premises described in paragraph ninth of this bill for a width of three hundred feet and not less than seventeen feet in depth along the entire length of said premises, and will cast the said mud and earth between the said line of piling and the shore line of said sections 32 and 33, in township 21, and section 4, in township 20, and will fill up the said channel; that by means of said dam and embankments the waters of the Puyallup River have been diverted and forced from their course and thrown into a new channel running due north to the waters of Commencement Bay (Rec., 19, 20.)

"SEVENTEENTH.

"That the defendant, without any claim or color of title to said lands against your orator or against any person whatever, has entered upon the lands described in paragraphs second and fifth of this amended bill, and willfully and without a shadow of right is proceeding to cut a deep channel or canal three hundred feet in width, and no less than seventeen feet in depth from the section line dividing townships twenty and twenty-one north, of range three east, and extending northerly three hundred feet through the west half of the west half of section 34, in township 21 north, of range three east, of the Willamette meridian, described as commencing at a point three thousand nine hundred and sixty feet west of the southeast corner of section 34, township 21 north, of range three east, of the Willamette meridian; thence north thirteen hundred and twenty feet; thence west thirteen hundred and twenty feet; thence south thirteen hundred and twenty feet; thence east thirteen hundred and twenty feet to place of beginning, and also at a point described as 80 chains east and twenty chains north of the southeast corner of section 32, in said township and range; thence north twenty chains; thence east twenty chains; thence south twenty chains; thence west twenty chains to place of beginning, with the design, purpose, and intention, when said channel shall have been completed through the lands aforesaid, of causing the waters of the said Puyallup river to so diverge as aforesaid from their usual and customary channel, and to lead said waters into the channel now being made as aforesaid." (Rec. 20)

"EIGHTEENTH.

"That the making of said channels as aforesaid would permanently injure the said lands of complainant and would absolutely destroy that portion through which the channel is being made for the use and construction of wharves or other valuable improvements; that the waters of the Puyallup River, through the said acts of the defendant, will be let in upon the said lands of your orator and will permnaently overflow the same; that they will not be useful for any valuable purpose

whatever, and thereby great and irreparable injury will accrue to your orator." *(Ib.)*

"NINETEENTH.

"That your orator intends filling in said lands aforesaid and erecting thereon warehouses and other buildings, over and across which lands general traffic may be carried on to and from the City of Tacoma. *(Ib.)*

"TWENTIETH.

"That the said Puyallup River has a swift and eddying current, and that since this defendant has diverted the waters of the said river from their course and by reason thereof certain wharves erected by parties other than your orator and in the line of the said river as it is now running—without any channel—have been by means of the action of the waters of said river undermined and large quantities of freight lying thereon have been discharged into the waters of Commencement Bay, and your orator alleges that if defendant is not restrained from executing the design of digging such channels across such lands of complainant hereinbefore described and leading the waters of said river into said channel that it will be impossible to construct and maintain strong and safe wharves or docks on said lands or to fill in and reclaim the same, and the value of said lands will be permanently destroyed." (Rec. 21.)

"TWENTY-FIRST.

"That by reason of the acts of the defendant already committed your orator has been damaged in the sum of ten thousand dollars ($10,000.00), and unless said defendant is restrained from executing its design as hereinbefore alleged your orator will suffer damage in the sum of at least one hundred thousand dollars." *(Ib.)*

Whereupon, the complainant prays for injunctions and damages, and the removal of the unauthorized obstructions;—so that the Puyallup's waters may resume their natural course. *(Ib.)*

To this bill, the defendants demurred upon the ground that it did not state facts sufficient to constitute a cause of action, or a ground for equitable relief. (Rec. 23 top.)

The court sustained the demurrer and dismissed the bill *(Id.* 26 mid.*)*; apparently altogether upon the ground that these lands had not been surveyed, so as to be subject of entry, waiving all other inquiries. *(Id.* 24–25.*)*

From this decree of dismissal the complainant appeals. *(Id.* 26.*)*

By reference to the accompanying map (of which the original—'Exhibit A;' Rec. 9 to 13—is filed with the transcript in the Clerk's office) it will be seen that the Tacoma Land Company has built a dam from the S. E. end of Boot Island to the main land, and from the northerly shore of that island to the southerly extremity of the small island lying northerly of Boot Island; thereby, and for the purpose of, diverting the waters of Puyallup river from their accustomed channel, (Rec. 9 bot.) south of Boot Island, to the new channel defendants are excavating to the north of this island and easterly of the neighboring island, and on through the lands certificated to the complainant, or his predecessor in title, Manning, as delineated on the map. It shows also where piling is being driven, and wharf-excavation being made, through the Joab lot, along the shore of the main land. (Rec. 9, 10, 11 and 12.)

The photographs there referred to are upon file, with the transcript, in the Clerk's office.

Statute.

The act in favor of Valentine and his assigns is as follows:

CHAP. LXXXIX. *An Act for the Relief of Thomas B. Valentine.*

"*Be it enacted*, &c., That the Ninth Circuit Court of the United States, of California, be, and hereby is, authorized and required to hear and decide upon the merits, the claim of Thomas B. Valentine, claiming title, under a Mexican grant to Juan Miranda, to a place called the Rancho Arroyo de San Antonio, situate in the county of Sonoma, and State of California, in the same manner, and with the same jurisdiction, as if the claim to the said tract of land had been duly presented to the Board of Land Commissioners under the provisions of the act entitled 'An Act to ascertain and settle the private land claims in the State of California,' approved March third, eighteen hundred and fifty-one, and an appeal had been duly taken from their decision to the District Court of California, by the said Thomas B. Valentine.

"SEC. 2. That on the said hearing any testimony heretofore taken before the said Board of Commissioners, in relation to said claim on behalf of the said claimant, or of the United States, may be read, subject to all just exceptions to its competency; and additional testimony, on either part, may be taken, under the order and direction of said Circuit Court, as to the validity and extent of said claim.

"SEC. 3. That an appeal shall be taken from the final decision and decree of the said Circuit Court to the Supreme Court of the United States, by either party, in accordance with the provisions of the tenth section of said Act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision; and a decree under the provisions of this act, in favor of said claim, shall not affect any adverse right or title to the lands described in said decree; but *in lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for, an*

equal quantity of the unoccupied and unappropriated public lands of the United States, *not mineral*, and in tracts not less than the subdivisions provided for in the United States land laws; and, *if unsurveyed when taken*, to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this act: *Provided*, That no decree in favor of said Valentine shall be executed nor be of any force or effect against any person or persons; nor shall land scrip or patents issue as hereinbefore provided, unless the *said Valentine shall first execute and deliver to the Commissioner* of the General Land Office *a deed conveying to the United States all his right, title and interest to the lands covered by said Miranda grant.*"

"Approved, April 5, 1872."

(17 Stats. 649, 650.)

The records of this Court show its decree entered, upon appeal, in favor of the claimant, January 6, 1874; as recited in the amended bill. (Rec. 16, bottom; 17 fol. 32 and 18 middle.)

A summary of the proceedings will be found in the decision of the Sec. of the Interior of Feb. 28, 1879. (6 Copp's Land Owner, 27, 28).

Assignment of Errors.

The appellant assigns for error

(1st) The sustaining of the defendant's demurrer (Rec. 26, middle) and

(2nd) The dismissal of complainant's bill, and the decree to that effect, and for costs to the defendant. *(Ibid.)*

BRIEF.

I.

The issue; and the decision below.

The precise question in this case is, whether or not the appellant's bill stated sufficient title to and interest in the *locus in quo* to entitle him to have enjoined and removed an admitted nuisance, committed under no pretense of lawful authority or color of right, and highly injurious to these lands.

The proper land-office had given evidence of title, which a mere trespasser could not collaterally dispute. It had certified these three 'forties' to Mr. Mann and those whose title he had acquired;—all three being located with Valentine scrip.

Whether the result reached by the Judge holding the Circuit Court was correct or incorrect, the decree cannot be affirmed upon the ground upon which his opinion places it; and which, therefore, it may be proper first to consider;—premising that the Court below assumes, as the basis of its decision, a state of facts which the record negatives;—and its error of law may follow from a misapprehension of the facts upon which it must be based.

The opinion (Rec. 24, middle) states that the bill is "to prevent the defendant from proceeding further with certain harbor *improvements* it is making *in front of land it owns*, abutting upon the shore." The bill states a course of procedure very far from indicating harbor improvements; and it is difficult to see how the Legislature of Pennsylvania could authorize a corporation to undertake a system of harbor improvements for Tacoma or Seattle. There is absolutely nothing in the record to show an attempt at any such authorization. Nor is there the least ground for the assumption *(Ib.)* that the alleged 'improvements' are in front of lands

owned by this foreign corporation. On the contrary, the bill states *(Id.* 20, fol. 36*)*, and the demurrer admits, that the defendant's proceedings are "willful and without shadow of right."

The next statement of the opinion, that our lands are mud-flats, bare at low water, etc., and unsurveyed, finds support in the bill; but the legal conclusion, that mere absence of survey destroys the title is negatived by the very tenor of the scrip and the statute authorizing its issue. The law contemplates the patenting of *any* 'unoccupied and unappropriated lands,' provided *only* that they shall be 'not mineral', in tracts not less than the *sub*-divisions of the U. S. land-laws; "and, *if unsurveyed when taken*, to conform, when surveyed, to the general system," etc. (17 Stats. 650; ante, p. 9).

Our tracts were recognized subdivisions; and the two forties first described will, 'when surveyed' become the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 34, etc., conforming to the general system. (Rec. 18 bottom.) The description of the Joab tract *(Ib.* top*)* shows that, when surveyed, it will also conform to the mentioned surveys already made.

In short, our selections conform to every *express* requirement, and except themselves from every *express* exception, of the act authorizing the issue and location of this scrip.

A description by metes and bounds, and a map of each of said tracts, were filed in the land-office when the selections were made; and, knowing well their situation, the land-officers, in discharge of their official duties, issued certificates for these lands. (Rec. 16, 17.)

These certificates, the scrip upon which they issued, and the lands they designated, were fully paid for by Valentine's conveyance to the United States of all his right, title and interest to the lands covered by the Miranda grant. (17 U. S. 650; *ante*, p. 9.)

These certificates practically conveyed the land and were evidences of title thereto, supporting a bill in

equity brought to protect the same, almost *ex necessitate*, before the patent issues;—although ejectment for *pre-empted* land, or any other action at *law* (for such land) can only be maintained upon a patent; but scrip like ours is the full equivalent of a patent.

Carroll v. Safford, 3 How. 460–1.
Langdon v. Sherwood, 124 U. S. 74.
Pike v. Wassell, 94 *Id.* 715 top.

The selections by Valentine's assignees "passed the fee out of the United States and vested it in them as grantees. *The scrip and application became the instruments of title* and conferred on them the legal title as effectually as could have been done by a patent."

Larriviere v. Madigan, 1 Dill. 457.

The statute under which this scrip is issued allows the prescribed quantity and character of land to be *taken* by it; not merely selected under or with it (*ante*, p. 9).

Of non-mineral, vacant, unappropriated land, Mr. Valentine could 'take' forty acres wherever it suited him best. Upon equitable considerations, and having reference to the character of the tide lands and upland included in the Miranda grant—'taken' from him by the United States, and so disposed of for her benefit that it could not be restored—he was given his power of choice of similar lands.

The statutory scrip makes Mr. Valentine's selection under it a 'taking' of the selected land, which 'shall' be followed by the usual formal patent. He extends his levy wherever he chooses on unappropriated, non-mineral land, and the title thereby passes. Land, surveyed or unsurveyed, highland or lowland, cannot be 'taken' without a transfer of title. Mere temporary, or tentative, or preliminary occupation is not a 'taking', as that term is always used in such statutes.

Cushman v. Smith, 34 Me. 247.
Bonaparte v. Camden, Baldw. 225.
Dorrance, 4 R. I. 245 bot.

To take, as there used, is to appropriate to one's own use.

Having authority from Congress to take by selection, all the proceedings required to be thereafter had in the premises are purely ministerial; not themselves a transfer of title, but evidence of one already completed, to which this statute imperatively entitles the scrip-holder.

Mo. v. Kans., 97 U. S. 496.
Morrow v. Whitney, 95 *Id.* 555; 112 *Id.* 695.

The command to issue a patent for the land to be taken is, of itself, a requirement to make a survey and to do everything essential or usual as preliminary to such issue; upon the familiar principal that, where an act is directed, or power to perform it is conferred, there is included all necessary, or usual, or proper modes and means of accomplishing the end.

Valentine v. Piper, 23 Pick. 92.
Decker v. Freeman, 3 Me. 388.
Story on Sales, § 70.
17 Atty. G.'s Ops. 100, 101.

There is a recent decision of this court, opinion per GRAY, J., illustrative of this principle, the name of which case cannot, at this instant, be recalled.

So construing this statute, and obliged to recognize the peremptory demand this scrip made upon *any* vacant, etc., public land, surveyed or unsurveyed, the Land Department issued instructions to the various local officers accordingly, prescribing the course to be pursued with regard to selections made with this scrip; recognizing that such selection, *ipso facto*, segregated the selected sections or subdivisions from the public domain, converting them into the private estate of the scripee.

Circular, June 17, 1874, G. L. O., 1874, p. 63.

When the Government issued the scrip and it passed into the possession of Valentine or his assignees, the first step in the process of alienation took effect, and as soon as the scrip is located on any unoccupied and unappropriated public lands not mineral, surveyed or unsurveyed, the entry is perfected, the alienation of the land is complete, the right vests, and it is beyond the control of the Government or the scrip locator; and nothing more remains to be done but to adjust the location to the public surveys and issue patents therefor.

When the application is made to locate the scrip in the local land office and the notification thereof is received by the applicant, the location vests from the date of the application, which is the statutory 'selection'; that instant the fee in the land passes out of the United States and is vested in the scripee as grantee.

We have abundant judicial authority to show that Mann acquired a vested interest in the land when his selection and location were made. Chief-Justice WAITE, in the case of Simmons *v.* Wagner (101 U. S., 260), said:—

"Where the right to a patent has once vested in a purchaser of public lands it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. (Barney v. Dolph, 97 U. S. 652; Stark v. Starr, 6 Wall., 402.)

In the case of Wirth v. Bronson, 98 U. S. 121, Bronson was the assignee of Edgerton, whose land warrant was duly located upon the land in controversy. The Court said:—

"Everything was done which was required to be done to entitle Edgerton to a patent for the land. Being for military bounty, no price was payable therefor. The land became segregated from the public domain and subject to private ownership and all the incidents and liabilities thereof." (98 U. S. 121.)

In Witherspoon *v.* Duncan, 4 Wall., 210, 220, the court said:

"In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property. If subject to sale the Government has no power to revoke the entry and withhold the patent. . . .

"The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title."

. . . . . .

"This question was fully considered in this court in Carroll *v.* Safford, 3 How., 450, and the views we have presented only reaffirm the doctrines of that case."

"But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office and the patent issued. . . . In either case, when the entry is made and certificate given, the particular land is segregated from the public lands and becomes private property. *In the one case the entry is complete when the money is paid;* in the other when the required proofs are furnished. In neither case can the patent be withheld if the original entry was lawful."

In Stark vs. Starr, 6 Wall., 402, 419, the Court said:

"The right to a patent once vested is treated by the Government when dealing with the public lands as equivalent to a patent issued; when in fact the patent does issue it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

It can make no difference in law whether the intervenor is another individual, or a State claiming by an *ex post facto* title.

We refer again to the before-cited case of Lariviere v.

Madigan (1 Dill. 457) only as preliminary to reference to departmental action upon claims made under the act to which that decision related.

"The location of the land with the scrip under the Act of Congress of July 17, 1854, passed the fee out of the United States, and vested it in the plaintiff as grantee.

"*The scrip and application became the 'instruments of title,' and conferred upon him the legal title as effectually as could have been done by the issue of the patent.*" (1 Dill. 457, citing 13 Pet., 513; 11 How., 568, etc.)

The Sioux Half-Breed Act of July 17, 1854 (10 Stat., 304), provides, among other things, that the scrip can be located on unsurveyed lands.

The instructions of the Land Department in reference to the location of Sioux half-breed scrip are substantially similar to the instructions issued in regard to the location of Valentine scrip, and follow the decision of the Circuit Court of the United States in Lariviere v. Madigan, *supra*.

Circular, 1857 (1 Lester, 628).
Circular, 1864 (2 Lester, 370).
Circular, 1872 (Copp, 1st ed., 728).
Circular, 1878 (*Id.*, 2d ed., 1356).

The Secretary of the Interior in the case of Allen vs. Merrill (8 L. D., 207, 220), in the matter of the location of Sioux half-breed scrip on unsurveyed lands under the act of July 17, 1854, follows the Court in Larriviere vs. Madigan (*supra*). The Secretary said:

"The act authorizes the location of the scrip upon unsurveyed lands by the same words in which it authorizes the location upon surveyed lands, and the rule laid down in Larriviere vs. Madigan is as applicable to the one case as to the other. The title passed out of the United States to the half-breed, when the scrip was rightfully located upon unsurveyed land to the land upon which it was located. It may be doubtful whether he could be required to change the boundaries

of his location because they did not correspond with the Government subdivisions of the subsequent survey."

In Canfield v. Bosworth (1 L. D. 431) the Secretary assumes, as he necessarily must, the legality and probability of this Valentine scrip being located upon unsurveyed lands;—

"*When a claim is located upon ground before survey, either with Valentine scrip* or under the pre-emption laws," etc.

And in his decision of February 28, 1879, rejecting the application to locate Valentine scrip on lands within the incorporated limits of the City of Chicago (6 Copp's Land Owner, pp. 27, 28) he said:

"I am of the opinion that it was intended that this scrip should be located upon *any* unoccupied and unappropriated public lands, not mineral, which were in a state of nature."

It is sufficiently well established, then, that the scrip vested the moment it was located on the class of public land described in the Act of 1872 (Ante, p. 9).

Mr. Mann located his scrip according to the provisions of *the law*, and received a certificate therefor from the Register and Receiver of the Land Office which entitles him to a patent under the law and the decisions of the department.

The Secretary of the Interior recognized in the Cogswell case (3 L. D., 25) that

"When the land has been purchased and paid for and a final certificate issued it is no longer the property of the United States, but of the purchaser. The final certificate which the purchaser holds can no more be canceled by the United States than a patent,"

citing the above-cited decisions of the Supreme Court in support of his decision: Carroll v. Safford, and other cases cited *supra*.

Our right was very different from that of a pre-emptor. It was stronger than that of the plaintiff in the last-cited case. Ours is *a statutory grant to an individual;* it rested upon a *quid pro quo* already received by the Government, Valentine's deed being given to quiet titles to lands of which it had previously disposed and received the consideration. It was not permission to members of a *class* to enter, nor a permit to enter upon the performance of any condition, precedent or subsequent, such as cultivation, improvement, or timber-planting, etc. For a full equivalent received, it was a *grant* to this one man and his assigns of *any* public lands he or they might select and *take*, provided *only* that there was no adverse occupation or appropriation of them, and that they did not contain minerals.

It was broader than railroad grants; which are conditioned upon the subsequent building of the road; yet such grants are "*in præsenti*, except as their operation is affected by that condition." (106 U. S., 365.) The sections and "subdivisions" which will ultimately accrue to the corporations can only be ascertained when the road's location is finally established, and must vary greatly as one or another of numerous possible routes between the prescribed termini is preferred. "The difficulty in immediately giving *full* operation to it" arises from this fact. *(Ib.)*

"When that route is thus established the grant takes effect upon the sections by relation as of the date of the Act of Congress. In that sense, we say the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and *passes the title as fully as though the sections had then been capable of identification.*"

Van Wyck v. Knevals, 106 U. S. 365.
Wright vs. Roseberry, 121 *Id.* 500.

True, the phraseology of these railroad grants differs from that of the Valentine act; but in legal effect it is the same; giving him land in defined quantities and

'subdivisions,' the precise location of which is to be ascertained by the exercise of the option given him. The filing of his claim and map determined the matter precisely as the filing of a railroad's location does, and should have the same effect.

Rutherford v. Green, 2 Wh. 198.
Wallace v. Parker, 6 Pet. 688.

The circumstances of the present case are *sui generis;* the ordinary methods of obtaining title are therefore inapplicable. A pre-emptor, etc., must perform conditions which render it impossible to acquire title to the land until due proof of their performance has been made. A New-Madrid sufferer had to convey his injured land contemporaneously with his acquisition of the substitute. Here, the very act of selection and taking defined the land, and gave title by relation thereto, there having been no prior occupation or appropriation of it. In our case, the scrip issued was itself a grant of so much land as it mentioned, previously paid for.

"Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

Gibson v. Choteau, 13 Wall. 99.

It here prescribed the *time*, as on demand; the *condition*, that it should not be mineral, nor previously otherwise appropriated; the *mode*, the locating of the scrip on the selected land, regardless of any survey, except it must be capable of being included; the *person*, Thomas B. Valentine and his representatives; the only specified limitation of *quantity* is, that it must not be *less* than forty acress (or smallest 'subdivision'), in one selection or taking. It is provided that patents 'shall' issue for lands taken upon this scrip;—but these are means of evidencing a previously acquired title. (*Ante*, p. 9.)

The act makes no discrimination between surveyed

and unsurveyed lands, as to their taking and the effect thereof.

In either case, the lands are "TAKEN" by the location of the scrip. (*Ante*, p. 9.)

Herein is a wide difference between the scrip-holder's right and that of a settler upon unsurveyed lands; constituting this one of the "special cases" which are exceptions to the general rule, because specially provided for by a peculiar statute.

Buxton v. Traver, 130 U. S. 235.

The Court below erred, in applying to this exceptional case the established rules of a supposed system to which it is an exception. (Rec. 25.)

The opinion substitutes for the statutory word "unsurveyed," as descriptive of the land to be '*taken*', the phrase 'which remains to be surveyed.' The conclusive effect of a survey, as declared in the decision which the Judge cites (1 Black, 204), is limited to *the lands surveyed;* and does not at all affect, or relate to, the selection or disposition of lands outside any survey;—except to establish that they are not within it.

In every city that has sprung up along our shores, the original line dividing the waters from the land has never long constituted such division. 'The march of the encroaching city' has steadily obliterated earlier lines, till warehouses tower where ships have floated.

The best use of flats, in front of a growing town, is as foundation for wharfs and structures to subserve the purposes of vessels navigating the deeper waters; and to erect such is the complainant's intention. (Rec. 19; 20, par. 'Eighteenth,' 'Nineteenth' and 'Twentieth;' *ante*, pp. 5, 6).

So long as any such place is within the boundaries of any territory, subject to federal legislation and control, it is competent for, and the duty of, Congress to make grants which will promote such constructions, regardless of the lines of any agricultural or other sur-

vey; for, practically, such improvements have to be made (in a new country, especially) by private enterprise.

In taking judicial notice of the action of the surveying officers in this particular locality, as a ground for sustaining this demurrer, the Court erred in its assumption that mud-flats, swamp-lands, or shores, were "outside the limits *subject* to survey," etc. (Rec. 25.)

If judicial notice be taken of this survey, it should extend also to numerous instances in which *just such lands* have been surveyed and sold by the Government in Washington Territory.

An examination of the laws of Congress shows the legislative construction of the term "public lands" to be applied to all classes of land belonging to the United States within the public domain.

Congress has never prohibited the sale or other disposal of the tide-lands or mud-flats, and the Department of the Interior, in executing the laws of Congress for the disposition of the public lands, has always treated the tide-lands or mud-flats as "public lands," and has *surveyed* and sold millions of acres in the territories. In Townships 32, 33 and 34 N., R. 3 east, W. M., State of Washington, more than twenty-five per cent. of the lands disposed of by the Government under the general land laws are tide-lands or mud-flats. The field-notes describe them as "land, tide prairie land, subject to overflow at high water two to four feet." (Field-notes, Seattle District, Washington Territory, Vol. 22, pp. 195, 197.)

The settlers reclaimed these lands by constructing dikes, and *the public surveys were extended over them* and the lands were disposed of under the homestead and pre-emption laws. As residence and cultivation was necessary in the acquisition of the public lands under these laws the settlers were compelled to dike them in order that they could fulfill the requirements

of the law by the necessary residence and cultivation; but in the acquisition of the public lands under the Valentine act of 1872, *supra*, residence and cultivation of the public lands before purchase is not required. When the scrip is located the title vests and the land is taken, and is segregated from the public domain.

As further evidence that the Land Department has treated the tide-lands or mud-flats of Puget Sound, Washington, as public lands by confirming entries and issuing patents therefor, reference is made to the following cases, some of which are *lands adjoining the Valentine scrip locations;*

H. C., ct. 669, Entry 952, E. ½ N. W. ¼ and W. ½ N. E. ¼ Sec. 27, Town. 32 N., R. 3 E., W. M. Patented March 1st, 1877, to Reuben J. Davis.

C. Ent. 30, S. W. ¼ S. E. ¼ Sec. 22, Town. 32 N., R., 3 east, W. M. Patented May 1st, 1872, to Wm. Billings.

C. E. 3179, lots 3 and 4, Sec. 22, Town. 32 N., R. 3 east, W. M. Patented May 1st, 1872, to James W. Law.

C. E. 3026, lot 1, Sec. 32, Town. 32 N., R. 3 east, W. M. Patented May 1st, 1872, to William Pix.

C. E. 5529, lots 4, 5, 6, Sec. 26, Town. 32 N., R. 3 east, W. M. Patented to Nelson Eide, Nov. 25, 1879.

C. E. 6258, lots 3 & 6, Sec. 25, Town. 32 N., R. 3 east, W. M. Patented Sept. 10, 1883, to Oley S. Naterand.

C. E. 5703, lot 14, Sec. 25, Town. 32 N., R. 3 east. Patented Oct. 6, 1881, to John Hicky.

P. A. 41 C. E. 5773, N. W. ¼ N. E. ¼ and lots 1 and 2, Sec. 25, Town. 33 N., R. 3 east, W. M. Patented Jan. 20, '82, to John Stevenson.

C. E. 218, lots 1, 2, S. 18, lots 5, 6, Secs. 17 & 18, Town. 24 N., R. 4 east, W. M. Patented Dec. 9, 1864, to David R. Campbell.

C. E. 265, lots 3 & 8, Sec. 18, Town. 24 N., R. 4 east, W. M. Patented Dec. 9, 1864, to Henry A. Webster.

C. E. 441, lot 1., Sec. 4, Town. 20 N., R. 3 east, W. M. Patented Nov. 1, 1865, to David Kelley.

C. E. 5082, S. ½ N. E. ¼, and lots 1 & 11, Sec. 6, Town. 31 N., R. 4 east, W. M. Patented Dec. 30, 1875, to James Hatt.

C. E. 5184, lots 3, 4, and 5, Sec. 6, Town. 31 N., R. 4 east, W. M. Patented March 15, 1876, to Gardner Kellogg.

C. 4961, lot 9, Sec. 4, Town. 20 N., R. 3 east, W. M. Patented to Ira Cogswell.

C. 2450, lot 1, Sec. 3, Town. 20 N., R. 3 east, W. M. Patented to John Gale, Jan. 20, 1870.

The instructions of Commissioner Wilson, of the General Land Office, of August 26, 1853, to the Surveyor General of Oregon to the effect that "the public surveys are to be made to *low-water* mark," were in force until April 14, 1875 (Com. G. L. O. letter, April 29, 1890, to Senator Dolph), when the Surveyors-General of Oregon and Washington Territory were instructed to "extend lines of survey only to high-water mark when surveying lands bounded by waters affected by the ebb and flow of tides." So that it can hardly be regarded as the "general policy of the Government to extend the lines of survey only to ordinary high-water mark."

Tide-lands are a *subject* of survey.

The instructions of the Land Department to the Surveyors-General of Oregon and Washington Territory of April 14, 1875, also provide that "the selections of the locations to be surveyed are left to your sound judgment and knowledge of the demands of settlers and other interests under the general laws of Congress."

It appears from the above instructions to have been the policy of the Government not to confine the surveys to lands demanded by settlers for agricultural purposes, but to require consideration also of "other interests."

Therefore it could not have been intended "by the Government surveys" that "the land in controversy" should be "excluded from the public lands", because they were lands between high and low-water mark. (Rec. 25.)

Congress, by the Act of March 2, 1889 (25 Stats.

959), crystalized into law the policy of the Government in conducting the surveys of the public lands, which provides—

"That in expending appropriations for the surveys of the public lands preference shall be given in favor of surveying townships occupied in whole or part by actual settlers; and the *surveys shall be confined to lands adapted to agriculture and the lines of reservations.*"

There must be the same power to extend the surveys over lands other than agricultural that was here exercised to restrict it; being a mere matter of temporary expediency; otherwise it would not have been necessary to have given them the "preference."

By the provisions of the Town-site Act of March 3, 1863 (12 Stat. 754; R. S. Secs. 2380, 2381.) the tide-lands on Puget Sound in Washington were surveyed and sold as *public lands.*

The act provides that—

"The President is authorized to reserve *from the public lands*, whether surveyed *or unsurveyed*, town-sites on the shores of harbors, junction of rivers, important portages, &c.," which reservations were "to be surveyed into urban or suburban lots . . . . for sale at public auction to the highest bidder, and thence afterward to be subject to sale at private entry."

Under this authority the President created the reservation of Port Angeles in Washington Territory (Land Laws U. S., vol. 2, p. 1182) which included land to *low-water mark*, subdivided and sold the same at private entry. More than one hundred lots were sold lying between high and low-water mark. (Records Port Angeles town-site, G. L. O., Div. G.)

The Court erred, then, in assuming (Rec. 25) that these lands were so 'outside the limits subject to survey'—or that limit to which they may rightfully, at any time, be lawfully (or by law) extended—as to prevent

their being 'taken' *under the peculiar and comprehensive terms of this Valentine Act.*

The government had dispossessed Valentine of his land and disposed of it. Upon the condition precedent that he should establish his title thereto in their courts, and then transfer that title to the United States, he was to have his own selection of a like quantity of any of the unoccupied and unappropriated land, not mineral, surveyed or unsurveyed, wherever it best suited him, or his assignees, to locate.

It evidently was the intention of Congress, as the proceedings show, to place Valentine or his legal representatives in the same position relatively as he occupied when he was dispossessed by the Government of his lands, which were in a state of nature. He or his legal representatives were not restricted from locating their scrip upon any of the unoccupied, unappropriated, or unsurveyed public lands, except the mineral lands. (2d Sess., 42d Cong., Part 3, pp. 1986, 1987.)

It appears that the only class of public lands excepted in the Act of 1872 was the *mineral lands*, and according to the legal maxim, *expressio unius est exclusio alterius*, Congress having named the lands to be excepted, it was an exclusion of any other; that is, no other class of lands could be included in the exception, and the granting act applied to all the classes of public lands except the mineral lands.

The Supreme Court in Rhode Island vs. Massachusetts (12 Pet., 657, 722), applied this maxim;—

"This Court, in construing the Constitution as to the grants of powers to the United States and the restriction upon the States has ever held that *an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition, and have laid it down as a general rule that where no exception is made in terms none will be made by implication or construction.*"

Certainly no narrower construction can be given to a *compensatory, contractive* grant or statute: which gives nothing as a bounty, but conveys for a judicially-established consideration.

It was a *lure* as well as a contract of conveyance.

Schulenberg vs. Harriman, 21 Wall., 62.

This act of 1872 (*Ante*, pp. 8, 9) is a statutory conveyance, rather than a *mere* grant, of the lands Valentine, or his assigns, may select. So soon as the selection or location is made with it, on the class of public land described in the act, that instant the title to the land vests in the locator, and he cannot be divested of his title, without his consent.

"A grant by Government of a certain quantity of land, to be afterwards surveyed and laid off within a territory, *vests* in the grantee a *present* and *immediate interest*."

Fremont vs. U. S. 17 How. 542.
Tamerling v. U. S., 93 U. S. 663 bot.
Palmer v. Low, 98 *Id.*, 17 top.

The effect of selection, under similar statutes, conferring a power to choose has been sufficiently defined by this Court:—

"The land was granted by the Act of 1820. It was a present grant, wanting identity to make it perfect, and the Legislature was vested with full power to select and locate the land; and we need only say here what was substantially said by this Court in the case of Rutherford vs. Greene's Heirs (2 Wheaton, 196), that the Act of 1820 vested title in the State of Missouri of four sections, and that *the selection made by the State Legislature, pursuant to the Act of Congress*, and the notice given by such location to the Surveyor-General and the Register of the local office where the land lay, *gave precision to the title and attached it to the land selected*."

Lessieur vs. Price, 12 How. 59.

These lands, selected by Valentine's assignees, were

those charged by the statute with the trust of replacing similar lands taken from him; and his equity, being stronger, as well as prior in time, cannot be displaced by any set up in behalf of the then unformed State of Washington.

Knight vs. U. S. 142 U. S. 183 bottom.

II.

Questions Passed Over Below.

In its opinion, the Circuit Court rests its conclusion upon the ground we have just considered; saying—

"In deciding this case, I shall leave untouched the interesting question as to *the power of Congress to dispose of tide-lands in a territory*, and most of the many other important questions which have been discussed in the very able arguments made before me, my opinion being such that it is unnecessary for me to do more than pass upon the single question as to the validity of the plaintiff's claim of title; and a single reason for my opinion upon that question is all that need be given." (Rec. 24, bottom.)

Deeming that reason insufficient for the conclusion reached, and foreseeing that this Court will probably discuss other subjects, as affecting "the validity of the plaintiff's claim of title," it becomes necessary for us to present our views thereon.

Public Lands; Power Over Them.

Differing from the Court below we treat this case as mainly addressed to the question whether or not this unrestricted (so far as the present issue is concerned) scrip can be located upon the public lands of the

United States (not then within the limits of any State) which are subject to be bare or submerged, according to the ebb and flow of the tide;—and what, *if any*, rights (*other* than that of taking, if necessary, by right of eminent domain) did the State of Washington, by its admission to the Union, acquire over public lands not expressly granted to it by the enabling act? and what must be the relative subordination of any such right of the State (if any such right exist) as to persons who had previously acquired legal title, or possessory (or other) equitable claim, to any such public land, recognized either by the express legislation, or the practical administration, of the land laws and system of the United States? and how, if at all, are any such private titles or claims affected by the fact that the granted or claimed land lies between high and low water marks?

We have to start with an inquiry into the nature of the original title of the United States to public land within what are now the territorial limits of Washington; and subsequently consider how far, *if at all*, this title is qualified by the fact that the present subject of litigation is tide-land; and, then, to what extent, *if at all*, the title is affected by the admission of Washington into the Union.

The legal definition of 'land' is "any soil or earth whatsoever; and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man" (Webst. Intern. Dict.); or, "Ground, considered as a subject of use or possession," (Cent. Dict.)

See all the Law Dictionaries, etc.
Mott vs. Palmer, 1 N. Y. 572–3.

An individual may own any property of this description.

"Public land" is simply such property, the ownership of which is in the nation; held for the general

benefit and common interest of the citizens of *that* nation which is the owner.

Property of this comprehensive and permanent description may be acquired and held, by nations as well as natural persons, by varying tenures; absolutely, or impressed with trusts of different origins, forms and characters.

For example;—our federal government acquired its public lands, partly by cession from the original States, upon certain terms; by negotiations with foreign nations, under treaty stipulations; and by the right of discovery, unrestricted and absolute.

These truths, because elementary, are stated at the outset in order to impress the observation (equally elementary) that every judicial decision, touching the title to our public lands, must be considered with reference to the manner of acquisition and nature of the tenure of the title which was the subject of litigation and examination, in each particular instance.

Nature of U. S. Title.

The title of the United States to public lands in Washington originated in *discovery* of the country;—which title is absolute and unqualified.

It is an "original, fundamental principle, that discovery gave *exclusive* title to *those who made it.*" Johnson vs. McIntosh, 8 Wheat.*574.

Capt. Gray's discovery was made by him as a citizen of the United States, not of Massachusetts; in a vessel documented by, and flying the flag of, the United States. It *must* enure to the benefit of the whole nation, which maintained the title successfully, to the very verge of war; not to that of those who, under our national government, and owing to it allegiance, settled upon some of these discovered lands, by permission of the United States; whether the local government over

these settlers be territorial, or that of one of the states of the Union. *(Ib.)*

Martin v. Waddell, 16 Pet.*409.
Pomeroy, Const. L. 69, 70, 398.

"The lands of the United States, lying within the states, are held and subject to be sold as lands may be held and sold by individual owners, or by ordinary corporations."

U. S. v. Hughes, 11 Howd. 568.
Woodruff v. North, 18 F. R. 772.
Union v. Ferris, 2 Sawy. 179, 180.
Vansickle v. Haines, 7 Nev. 249.
Pomeroy Cons. L., 398, § 489.

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale *or other disposal* under general laws."

Newhall v. Sanger, 92 U. S. 763.

TIDE-LANDS.

Herein, we have special reference to such lands as are, like ours, never sufficiently flowed to make the waters, so running over them at high tide, navigable. (94 U. S., 324.)

The *title* of the United States to, or its rights in, land cannot be affected by the ebb and flow of the tide over it.

Its power of *disposition* cannot be changed thereby; —certainly, as to any such land as, at the time of disposal, lay within the limits of a territory; as was the case with that upon which Mr. Mann made his location and took the lands which he had *then* the right to take, if such right *ever* existed.

Naturally, the title accruing by discovery must be to every portion of the land discovered, wet or dry, above water or under water, qualified by nothing except the discovering nation's own sense of obligation to regard the *actual* occupation of tracts by the aborigines; who hold even this much subject to the discoverer, and to

his right of disposition in extinguisment of the aboriginal claim.

The United States acquired *everything* discovered, with all its possibilities of *any* use or improvement, *for itself;* not for some hypothetical, suppositional state, not yet conceived in the womb of the future. (8 Wheat. 574.)

The discoverer, or conqueror, in recognizing a vendible right in the aborigines, only places this amount of self-restraint upon himself; for it is merely a self-limitation to say that the aborigines will be allowed to retain a salable interest, but can sell to nobody but the discoverer.

It is as much an exercise of power (if not as extensive or injurious an exercise) to say no sale shall be made to anybody else as it would be to deprive the aborigines of it altogether.

As Judge CATRON (in his dissenting opinion in Pollard vs. Hagan) shows, there can be no valid distinction made between high lands and low, the title to both having the same origin and extent. (3 How. *231–2 and *235, last sentence of Op.)

That the claim of the new States originally applied equally to upland and flowed land is indisputable. Mr. Webster states it to have been so maintained by the Judge who delivered the majority opinion in Pollard vs. Hagan.

In his speech in the Senate January 14, 1839, after premising that he had given more attention to the public lands than other gentlemen from the East (invited thereto by Mr. Madison) and had sometimes differed from his party associates thereon, Mr. Webster observed:

"I heard doctrines and sentiments advanced which struck me *very strangely*. I recollect an able and elaborate argument by a member from Indiana, designed to prove that *all* the lands in any new State became the property of that State, by the mere fact of

her admission into the Union. I heard a speech in favor of the same sentiment, by a member from Alabama, so distinguished for legal and constitutional attainments as since to have been made a judge of the Supreme Court of the United States [McKinley]. These doctrines and opinions I have certainly opposed to the utmost of my power, as *having no foundation in constitutional law*, and as subversive of all justice and equity to the States. They did not obtain much favor with the country, and after a while appear to have been abandoned. (IV. Webst. Wks. 538–4.)

In the next to the latest speech ever made by him in the Senate, Mr. Webster, replying to the suggestion of Mr. Soulé that California, as a condition of admission as a State, should formally renounce any claim to the public lands within her borders, said:

"Let me remark that this question is not new here. I found it in the Senate the first session that I took my seat here. *There is a class of notions which run in a sort of periodical orbit.* They come back upon us once in fifteen or twenty years. The idea that the sovereignty of a State necessarily carries with it the ownership of the public lands within its limits was rife here twenty years ago. It was discussed, considered, debated, *exploded*. It went off, and here it is back again, with exactly the same aspect which attended it then."
V Webst. Wks., 390.

He then quotes the Indiana resolutions of 1828–9, which will be seen to base the right claimed upon an alleged reservation of it, for her benefit, in Virginia's "deed of cession." *(Ib.)*

He refers to Sen. Douglass of Illinois having shown "that, in the creation of a State, *its admission as a State has no effect at all on the property of the United States* lying within its limits." *Id.* 395, citing this sentence from Pollard v. Hagan, 3 How. 224;—

"We therefore think the United States hold the public lands within the new states *by force of the deeds of cession*," etc., etc. (3 How. 224.)

See *Van Brocklin vs. Tenn.*, 117 U. S., 164–5.

Upon his circuit, June Term, 1852, McLean, J. said ;—

"On the part of complainant, it was contended that, on the establishment of the state government, Michigan by virtue of her *sovereignty*, had a right to *all* the lands within her limits. This argument is not now advanced for the first time. Several years ago, it was broached in the Senate, and in some state legislatures, but it was received everywhere with less favor than its advocates anticipated. . . . . Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless."

Turner v. Am. 5 McL. 349-7.

The decision in Pollard vs. Hagan, *if intended to cover all the ground upon which the opinion bases it*, would sustain this claim, with regard to Alabama at least.

Judge McKinley's reasoning is that the territory out of which that state was carved was ceded to the United States in trust, and to be erected into States ; that the federal right was measured and limited by the terms of this cession and trust, and terminated with the performance ; that its claim to lands in Alabama rested upon that state's disclaimer of all " waste and unappropriated lands within the said territory " ; and that the lands there in controversy were not within the language or meaning of this disclaimer. (3 How. 221 *et seq.*)

The extent of the trust was declared to be to convert the ceded lands into *money* and erect new states therefrom (p. *224) ; and that even an express stipulation for a federal right of eminent domain, over any of it, would have been void " because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere unless in the cases in which it is *expressly* granted." (p. *223.)

To the contrary of this, and that there are many powers that can be exercised as *implied* in the idea of national sovereignty (including the above-denied one

of eminent domain) later cases, too numerous to cite, abundantly show.

Kohl v. U. S., 91 U. S. 367.
Legal Tender cases, 110 *Id.* 438.

Assuming Pollard vs. Hagan to have been rightly determined, it must be so upon its main ground—of the limitations of the cession and trust—and not correct in the general tenor of the opinion; hence, to be confined to cases presenting a similar state of facts.

In Weber vs. Commrs., 18 Wall., 65, 66, California's right is based upon the terms of the act admitting her into the Union. And, without examination of the cases in detail, it may be observed generally, that the decisions, State and Federal (down to Hoboken vs. Pa. R. R. 124 U. S., 656) make the title to tide-lands depend upon the origination and laws of the State within which they lie, and its relation to the Federal government.

San F. v. Irwin, 28 F. R. 709; 136 U. S. 578.
Hardin v. Jordan, 140 *Id.* 382–3.

The Federal government, as such, has no distinct policy of its own, as to ownership of flowed lands; except as it choses to grant them. The States have differing policies, Washington denies any special right to a riparian owner, as accruing to him from such ownership. No claim to the flats can be based thereon. (See *post*, pp. 35, 36.)

Eisenbach v. Hatfield, 2 Wash. 236.

In this particular, we shall see that the United States relinquished nothing to Washington, upon its admission, beyond the lands, in the enabling act, specifically mentioned. See Act Feb. 22, 1889, c. 180, § 4, item 'second' (25 Stats. 677); §§ 10 to 13 (*Id.* 679, 680); § 17, fifth and sixth paragraphs (*Id.* 681); § 18 (*Id.* 681–2).

These new States, provided for in this act, were excluded from the benefit of swamp land grants.

A conquest of Washington by, or a cession of it to, England would no more have affected private titles than did our acquisition of it.

Strother vs. Lucas, 12 Pet. 410.
Inter-state vs. Maxwell, 139 U. S. 569, and authorities *passim*.

Certainly, then, mere permission to erect a different form of government by people already citizens of the United States, cannot at all disturb vested rights; especially when the very act giving such permission *expressly provides the public lands which shall be granted to the State on its admission into the Union,* as follows:

"SEC. 10. That upon the admission of each of said States into the Union sections numbered 16 and 36 in every township of said proposed States, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools." (25 Stats. 679.)

Subsequent sections (12, 14 to 16) make grants for public buildings. *(Id.*, 680–1.*)*

SECTION 17. In lieu of the grant of land for purposes of internal improvement made to the new States by the 8th section of the act of September 4, 1841, which act is repealed as to the States provided for by this act, and in lieu of any claim or demand by said States under the act of September 28, 1850, and Sec. 2479, Rev. Stat.. making a grant of *swamp* and *overflowed lands* to certain States, *which act it is declared is not extended to the States provided for in this act*, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to wit . . .
"100,000 acres of land for scientific school, 100,000 acres of land for State normal school, 100,000 acres of land for State capital, and 200,000 acres of land for charitable institutions," &c. *(Id.*, 681.*)*

And it is further provided in section 17 of the enabling act—

"That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act." *(Ib.)*

Therefore there could be no other grant of land to the State of Washington on her admission than is here expressly provided; certainly, no proprietary interest therein.

Section 4 of this enabling act required

"That the people inhabiting said proposed St at do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." *(Id.* 677, "Second.")

Article XVII. of Washington's Constitution contained these two sections;—

"SECTION I. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows: and, *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State.

"SECTION II. The State of Washington disclaims all title in and claim to all *tide*, swamp, and overflowed lands patented by the United States: *Provided*, The same shall not be impeached for fraud."

Any construction given to these sections, as asserting any greater claim than that allowed by the enabling act, would make them void; but the first does not assume to affect "vested interests," such as ours was; and the second disclaims all tide lands previously patented; and our scrip and location are the equivalent of a patent.

The Swamp Acts, of which Washington is denied the benefit, included tide lands.

"The testimony clearly showed that the land was subject to periodical overflows *by the rising of the tide* in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it by levees from such overflow. The act of 1850 grants swamp and overflowed lands; swamp lands as distinguished from overflowed lands may be such as require drainage to fit them for cultivation. *Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the* FLOW OF TIDES. *When drainage, reclamation, or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the act of Congress and the title passed by it to the State.*"

San F. vs. Irwin, 28 F. R. 712; 136 U. S. 578.

The above decision is an absolute recognition of the power of Congress to grant the lands in dispute, and similar lands, within those States where the United States is the landed proprietor; *a fortiori*, where the federal right and title is so guarded and reserved as in the act admitting Washington.

"In the Territories the National Government is both sovereign and proprietor. Congress has the power to govern them and in doing so exercises the combined power of the National and State Governments (Insurance Co. vs. Canter, 1 Peters, 542), and as such sovereign and proprietor it may dispose absolutely of all the public land in the Territory, whether high or low, wet or dry. For the time being, as sovereign, it has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor, it has the *jus privatum*, or right of private property, subject to the *jus publicum* (Gould on Waters, Sec. 17).

This *jus publicum*, whether held by the National Government during the territorial period or the State thereafter, may be sold or disposed of by either who represent the public."

Case vs. Toftus, 39 F. R. 933.

The Supreme Court in the case of Irwin vs. San Francisco Savings Union (136 U. S., 578), *supra*, where the question involved was the title of the State of California to tide flats capable of reclamation by embankment—the same class of lands as in the case at bar—held that the title to the land passed to the State by the Act of Congress of September 28, 1850 (9 Stat., 519), and not by virtue of her sovereignty—which is a recognition of the doctrine that the sovereignty of the State only exists over lands underlying *navigable waters* of the State, and not over flats susceptible of reclamation.

The Supreme Court in the case of Wright vs. Roseberry, 121 U. S., 488, in construing the Act of Congress of March 2, 1855 (10 Stats. 634) affirm the right to locate scrip upon swamp and overflowed lands; which, indeed, the act expressly gives. *(Ib.)*

After approvingly quoting in its opinion the above provision of the Act of 1855, this Court said;—

"If the purchase was made by warrant, or *in scrip*, the State may locate an equal quantity of land upon any other public lands subject to entry." (121 U. S. 488.)

Therefore the Act of 1855 and the Supreme Court's construction of it is a full recognition of the right to locate scrip upon the swamp and overflowed land—the class of lands in dispute—and the recognition of this right is a complete refutation of the assumption of the Court below, that their character excluded them from any possible future survey, and from our wide right of selection.

GRANTS PRIOR TO ADMISSION.

The existence of rights in the several plaintiffs in error sufficient to maintain their respective claims as against the State of Washington would seem to be indisputable.

That is to say, *if* Mr. Mann made a valid location of, and taking by, his scrip before the admission of Washington, then his *title* cannot be divested by that admission.

If we should concede the State to have this right of granting tide-lands now, it must have existed somewhere before the State existed; and it could then exist nowhere else than in the United States, which was both owner and ruler.

It cannot be that there is no power now competent to grant permission to build a wharf in Sitka; or that none existed, prior to 1889, that could authorize the erection of wharfs or the filling in of marshes at Tacoma and Seattle; which wharves or filled-lands would not be forfeited to the State, or be subject to unrecompensed destruction or injury by it, when created and admitted; and authority to build or fill, implies and includes the right to grant lands so situated as to be unfitted for any other beneficial or proprietary use.

The United States *must* have possessed such right *ex necessitate;* for the grant must precede the improvement.

This right has never been denied;—and it is all-sufficient to support Mr. Mann's claim.

Reaffirming the doctrine of Pollard vs. Hagan, this Court, by its Chief-Justice, added;—

"UNDOUBTEDLY, *Congress might have granted this* [tide] *land* to the patentee . . . *before Alabama became a State.*"

Goodtitle vs. Kibbe, 9 How. 478.
Irvine vs. Marshall, 20 *Id.* 561–2.

Lansing vs. Smith, 4 Wend. 21.
Gould vs. Hudson, 6 N. Y. 536.

Otherwise expressed, the State's ownership is qualified by the exception "*unless it had been granted* away." 94 U. S. 394.

Smith v. Md. 18 How. 74 bot.
Manch. v. Mass. 139 U. S. 259.
Shively v. Welch, 20 F. R. 32.
Teschemacher v. Thompson, 18 Cal. 11.

This has been very recently declared by the Supreme Court of Washington; though it prefers to rest the title of the grantee from the United States upon the *State's disclaimer*, rather than the strength of the Federal title.

Scurry vs. Jones, 30 Pac. R. 726; 4 Wash. ,

and a still more recent decision, to same effect.

This right has always been exercised by the United States.

The statutes by which overflowed lands (which includes tide-lands; 5 Wall. 794) are donated rest upon this right. The power to give implies the right to withhold; or to give to whomsoever the donor pleases.

If innavigable in fact, though the tide covers and discovers them in its ebb and flow, there is no jurisdictional right infringed by a grant of them; and the fact of a grant is, at least, *prima facie* evidence of innavigability.

Wright vs. Roseberry, 121 U. S. 517.

Certainly, any one who claims a wharf upon such lands to be an infringement of public rights must prove it.

Dutton vs. Strong, 1 Black, 23.

Judge DEADY, while constrained to acquiesce in a doctrine he considers to be established by the decis-

ions, (though unsound in principle) also perceives that it *can* only apply to lands not already granted by the United States; and says that, while tide-lands *undisposed of* by the United States passed to the State (Oregon) upon her admission, it was only a riparian proprietor whose estate abutted upon an *undisposed-of* shore that had the incidental rights of access, wharfing-out, etc. etc.

Case vs. Toftus, 39 Fed. R. 730.

ADMISSION AS A STATE.

The right and title of the United States is not displaced by the erection of this territory into a State. The *title* of the United States *as an owner*, with right of disposition, is not affected, even though the application for, and the granting of, admission may transfer such control over the *use* of the land as may prevent its being used to injure the public, and to facilitate its use for the common benefit.

This, indeed, applies to upland and shore. After the State government becomes operative, it interferes to prevent a lot granted by the United States being employed to create or maintain a nuisance; and the origin of the title will not interfere at all with the application of the maxim, *Sic tuo utere, etc.*

Munn vs. Illinois, 94 U. S., 125.
R. R. vs. Richmond, 96 *Id.* 529.

"Nor does the *ownership* pass from the United States, and vest in a particular State, when the latter becomes organized as a separate commonwealth, throws off its territorial character, and is admitted as a State into the Union; but *the nation retains its property*, and from it must all private purchasers derive their rights."

Pomeroy, Const. L., 70 top.
Irvine vs. Marshall, 20 How. 558.
Van Brocklin vs. Tenn., 117 U. S., 168.

The sum and substance of it all is, that the *private*

ownership of land is not disturbed *ipso facto* by any change in the form of government. If an individual owns land, upland or flowed, in a territory, he owns it in the State; if it belonged to the colony, it belongs to the State; if it was the property of the United States in the Territory, it continues to be so in the State.

The *jus privatum* is undisturbed.

The *jus publicum* must, necessarily, be in that government, which is, *pro tempore*, the guardian and administrator of public rights and interests; but that simply means the power and duty of seeing that private property is not employed to the detriment of these general rights and interests.

So long as the territorial condition continues, the United States, which owns the land, is charged with the duty of seeing that neither it *nor any other property* is so used as to destroy public rights; and, further, with that of determining what is a proper and permissible use. When a State arises, it assumes this duty, and is charged with this obligation, subject to national supervision as to any act said to interfere with commerce; but no change of title is thereby—*ipso facto*, and without special arrangement to that end—effected.

That which is necessary to the proper discharge of the functions newly assumed is transferred; — nothing more.

That the *title* passes, in the sense in which either nations or individuals convey lands to one another, is negatived in the case of Stockton v. Baltimore, 32 F. R., 9, where it was held that condemnation proceedings were not necessary to take such land as the foundation of bridge-piers, and that *the State had not such property therein as entitled it to compensation* for the taking.

As the State's right to control the use of property, in the interests of its citizens, is consistent with the federal right "to regulate commerce" (Manchester vs. Mass., 139 U. S., 262), so are both concurrently-exist-

ent with a right of private ownership by the Nation, State, or individual.

Conclusion.

It sums up thus:—The United States, as owner, while it was sole legislator too, and guardian of all public interests, could sell, or grant, or give tide-lands to whomsoever it might choose, by an unimpeachable title; and its grantee could only be dispossessed of them, for a public use, upon compensation made, as for other lands; whatever lands of this character remained undisposed of and *unreserved* passed under the control of the State within whose limits they were, upon its admission; its rights, however, were not proprietary, but only to control their use for a *public* purpose—the *jus publicum;* and, so far as necessary to preserve public rights, the State could control the use of that owned by a private citizen; subject itself to the commercial regulations of Congress.

These relations all harmonize. Congress controls within the constitutional sphere of its powers; the State looks after the public concern of its citizens in the use; and any private proprietor of such lands holds them only for such use as those governments permit.

THEODORE H. N. MCPHERSON,
EDWIN B. SMITH,
Of Counsel.

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IN THE

Supreme Court of the United States.

October Term, 1893.—No. 375.

JACOB C. MANN, Appellant,

vs.

TACOMA LAND COMPANY.

APPELLANT'S SUPPLEMENTARY BRIEF.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

JACOB C. MANN, Appellant,
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No. 375.

APPELLANT'S SUPPLEMENTARY BRIEF.

Statement.

The case and the decision below has been stated and discussed in the appellant's first brief. We now propose to further discuss the *precise question* whether the appellant's amended bill discloses sufficient title to, and interest in, the land to entitle him to have the defendant enjoined from committing a nuisance injurious to the land.

The defendant corporation, by demurrer, admitted the truth of the allegations contained in complainant's bill, which leaves nothing to be considered but the legal questions involved in his title to the land.

The appellant's rights, therefore, will be readily comprehended, and may be discussed under the following propositions:

I.

The Valentine Act of April 5, 1872 (12 Stat., 649, First Brief, pp. 8, 9), was a grant and contract, and should be construed so as to effectuate the legislative intention, which was to place Valentine in the same position, relatively, as he occupied when he was dispossessed by the United States of the lands contained in the Miranda Grant.

1. The Miranda Grant and the Valentine Act.

The history of the Miranda Grant and the Valentine Act is stated in the following decision of the Secretary of the Interior, February 28, 1879 (6 Copp's Land Owner, pp. 27, 28), as follows:

"The act of April 5, 1872, under which this scrip issued, provided that in lieu of the Miranda Mexican grant called 'Rancho Arrayo de San Antonia,' situated in the county of Sonoma, in the State of California, and an execution of a deed 'conveying to the United States all his right, title, and interest to the lands covered by said Miranda grant,' Thomas B. Valentine or his legal representatives 'may select, and shall be allowed patents for an equal quantity of unoccupied and unappropriated public lands of the United States not mineral, and in tracts not less than the subdivisions provided for in the United States land laws; and if surveyed when taken, to conform when surveyed to the general system of United States surveys.' (17 Stat., 649.)

"On investigation of the facts relative to the Miranda grant, I find that on October 8, 1844, Manuel Micheltorena, Mexican governor of California, granted to Juan Miranda the place known as Rancho Arrayo San Antonio, bounded by the laguna and arrayo of the same name and the pass and estero of Petaluma, containing three square leagues, more or less.

"California was acquired from Mexico by the treaty of Guadalupe Hidalgo, and by the eighth article of said treaty the United States stipulated to protect the property rights of all residents within the ceded territory in the same manner that the property rights of its own citizens were protected.

"This treaty did not, *proprio vigore*, operate as a confirmation of Mexican grants, but on the contrary, being executory in character, it addressed itself to the political department of the Government, and the duty devolved upon Congress of providing means for its enforcement.

"Congress, therefore, by act approved March 3, 1851, established a Board of Land Commissioners, with power to investigate the validity of said grants and titles, with right to appeal to the United States District and Supreme Courts.

"The Miranda grant was presented for confirmation to the Board of Land Commissioners by Valentine, and also by the grantees of one Ortega, who was Miranda's son-in-law. These parties claimed adversely to each other, and Valentine finally withdrew his claim, intending, it is alleged, to intervene in the District Court. Before the case was reached for trial in said court the Supreme Court had rendered a decision which precluded him from asserting his title by intervention. Ortega's claim was therefore prosecuted by his grantees, until finally rejected by the Supreme Court of the United States.

"After the claim of the grantees of Ortega was rejected *the lands were disposed of like other public lands*, and the proceeds covered into the Treasury.

"Subsequently Valentine produced satisfactory evidence that the land had been lawfully granted to Miranda by the Mexican authorities and conveyed to him by mesne conveyance, and Congress passed the act granting to Valentine an amount of scrip equal to the amount of land contained in said grant." (6 Copp's Land Owner, pp. 27, 28.)

Ex parte Valentine, 66 U. S., 501;
White, admx., *v.* United States, 68 U. S., 660.

The map made by the General Land Office in 1874 of the Miranda grant, of which the accompanying map is a

photo-lithographic copy (p. 4), shows that a large area of the lands contained in the grant were tide lands, which the court will take judicial notice of. They are the same class of lands that were involved in the case of Irwin, of San Francisco (136 U. S., 578), where the court said: "The testimony clearly showed that the land was subject to periodical overflows by the rising of the tide in the bay of San Francisco."

2. Proceedings of Congress on Passage of Valentine Act.

The following synopsis of the proceedings of Congress which resulted in enacting the Valentine law shows that it was a legislative contract, and that Valentine and his legal representatives were not restricted from locating their land scrip upon any of the unoccupied, unappropriated, or unsurveyed public lands, except the mineral lands, viz.:

"Mr. Townsend, of Pennsylvania, from the Committee on Public Lands, reported back a bill (H. R., No. 1024) for the relief of Thomas B. Valentine. * * *

"I will state that the bill is simply to permit Mr. Valentine to go into the Circuit Court of the United States for California and make his claim to a tract of land, to which he derives a right from one Miranda, who obtained a grant to the land from the Mexican Government, etc.

"Mr. TAFFE: I would like to ask the gentlemen a question as to the character of the scrip which is proposed to be given. I understand that it is not to be issued under any existing law, and that there is no qualification as to the location of it, whether surveyed or unsurveyed, minimum or double minimum lands, the *only exception*, I believe, being as to mineral lands. I should like that there were some indications as to the mode of location.

"MR. TOWNSEND, of Pennsylvania: As regards the point referred to by the gentlemen from Nebraska (Mr. Taffe) the bill reads thus:

"'And the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue script, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this act.'

"Now, the United States have got the *very best lands in California* from him. They have sold them, and put the money in the Treasury, and all this man asks is that he may have the opportunity, if he gains his case, of locating his script wherever he pleases on land which has not been taken by anybody, and in the legal subdivisions.

"We have considered this matter very fully. It has been considered in this House, it has been considered in the Senate, and it has received the sanction of the Committees of each House. It has passed this House twice, and it meets the approval of the gentleman from California, who believes that the rights of the people of that State are sufficiently guarded.

"And therefore we and they ask that this bill may be passed.

"MR. SARGEANT, of California: The Government of the United States, on the rejection by the Supreme Court of the right of intervention and the rejection of the Ortega grant, proceeded to *sell to parties in possession under its pre-emption and town-site laws, this property* upon which is now situated the city of Petaluma. But any man, I think, who examines the facts and ascertains the origin of this title must concede that the Government had no right to sell that land; that the title was really in Miranda, and that sometime or other justice must be done to the claimant.

"Now, if Miranda's successor is willing to accept other land instead of the specific property in question, the taking of which would dispossess 5,000 people of $2,000,000 worth of property, if he is willing to accept the unoccupied land elsewhere, it seems to me it is undoubtedly the wisest policy for the Government to accede to the proposition, in order to remove the cloud from the title which it has granted to these people, whose money it has had for years in the Treasury. * * *

"All that is asked is an opportunity for these parties to be heard, and when they are willing to accept—instead

of the land in question, which is *now worth millions and is increasing in value every day*—unoccupied lands of the United States, I trust there will be no objection to this mode of escape for the grantees of the general Government."

Congressional Globe, 2d sess., 42d Cong., part 2, pp. 1185–1189; part 3, pp. 1986–1987.

Courts take judicial notice of circumstances outside of an act, of public records and documents, general and local history, and other matters of general and public notoriety as may be supposed to have been in the minds of the legislators when the act was passed.

The Slaughter House Cases (16 Wall., 37);
Blake *v.* National Bank (23 Wall.);
Brown *v.* Piper (91 U. S., 42);
Blake *v.* United States (103 U. S., 235);
Wash. *v.* Towne (5 Wall., 689).

The act for the relief of Thomas B. Valentine and his assigns is printed on pages 8 and 9 of appellant's first brief.

3. The Valentine Act a Contract,

The act for Valentine's relief, when accepted by him, became a solemn contract between him and the United States. By the execution and delivery to the Commissioner of the General Land Office of a deed conveying "all his right, title, and interest to the lands covered by the Miranda grant" he conveyed to the United States the "tide" lands, as well as other lands belonging to him, included in that grant. This deed was a condition precedent to the exercise of the rights conferred by the act.

What were these rights, as defined by the act?

Valentine, or his legal representatives, in lieu of the lands covered by the Miranda grant, "*may select and*

shall be delivered patents for an equal quantity of unoccupied and unappropriated lands of the United States, not mineral, surveyed or unsurveyed."

The *intention* of Congress, as indicated by this act, under the circumstances, was manifestly to give Valentine the right of selection of lands of the United States belonging to the same classes as were to be found in the Miranda grant, which he relinquished. The import of the language is precisely this, and the contract to be equal requires the construction which the language plainly means. Any other construction would be against the *just intentions of the National Legislature.*

The rule of interpretation of statutes, as well as other written instruments, requires that they shall be construed according to the obvious meaning of the words employed.

In Huidekoper *v.* Douglas (3 Cranch, p. 70) the court said:

"When an act of the legislature is in effect a contract, it ought to be construed, although a State is a party, according to the well-established principles which regulate contracts generally."

In Fletcher *v.* Peck (6 Cranch, 137), where the question involved was a legislative grant of the State of Georgia, Chief Justice Marshall said:

"A grant is a contract executed, the obligation of which still continues."

In Wilkinson *v.* Leland (2 Pet., 662), the court said:

"A legislative act is to be interpreted according to the intention of the legislature apparent on its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature."

In the case of Pollard *v.* Kibbe (14 Pet., 353), where the plaintiff claimed title to tide land in the city of Mobile

under acts of Congress of May 26, 1824 (4 Stat., 66), and July 2, 1836 (6 Stat., 680), the decision of the State court was against the right and title set up under said acts, this court said:

"The act of Congress under which title was claimed, being a private act, and for the benefit of the city of Mobile and certain individuals, it is fair to presume it was passed with reference to the particular claims of individuals and the situation of the land embraced in the law at the time it was passed."

In this case the judgment of the Supreme Court of Alabama was reversed, and it was held that the said acts of 1824 and 1836 granted the land to Pollard.

This decision becomes important in two respects:

First: It construes the acts of 1824 and 1836 according to the legislative intention; and

Second: It affirms the right of Congress to grant the tide lands.

The court in Pollard *v.* Hagan did not reverse its decision in Pollard v. Kibbe, but simply held that the United States passed no title by said act of 1836 because it had parted with its title by the act of admission of the State. (*Infra*, p .23.)

The bill first introduced for the relief of Valentine (S., 542, 41st Cong., 2d sess.), limited his right of selection to lands, not mineral, belonging to the United States, "subject to pre-emption," while the act for his relief as passed (17 Stat., 649; 1st brief, pp. 8–9), limited his right of selection in no manner whatever, except as to mineral land; this places him in the same position of being able to acquire lands of the same character as those he had relinquished.

It is evident that Congress intended to right, as far as possible, the wrong done Valentine, in forcibly taking and disposing of his lands, the value of which was, at that time, worth millions, as appears by the proceedings

in Congress (2d session, 42d Congress, part 2, pp. 1185–1184; part 3, pp. 1986, 1989; *ante*, p. 4).

The Valentine Act was a special act passed with reference to a particular state of circumstances, and should be construed with reference to such circumstances and the accomplishment of those ends of justice which were of necessity involved; that is, that Valentine, in consideration of what he had relinquished, should be allowed to put himself in the same position of ownership and with respect to the some class of lands elsewhere.

In Law Ow Bew *v.* United States (144 U. S., 47) the court said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion. (Church of Holy Trinity *v.* United States, 143 U. S., 457; Henderson *v.* New York, 92 U. S., 259, 23:543; United States *v.* Kirby, 74 U. S., 482, 19:278; Oates *v.* First National Bank of Montgomery, 100 U. S., 239, 25:580.)"

It was decided in United States *v.* Smoot, 15 Wall., 36:

"This court will apply to contracts made by the Government the same construction and effect as to contracts between individuals."

Congress said substantially to Valentine:

You shall be put to the necessity of proving your right to the lands, including tide lands which were taken, and after you have proved this in the Circuit and Supreme Courts of the United States, and have obtained their judgments in your favor, then, when you have further relinquished and conveyed all your right, title, and interest to the United States in the lands which we have taken, you shall have the right to select the same class of lands elsewhere from the public lands of the United States as those taken.

The general land legislation of the United States in which the Government is, so to speak, simply exercising its bounty, has nothing to do with such a case, and it can not be utilized as matter of argument where the right of the claimant arose out of the tortious act of the Government in taking his lands in the first instance and disposing of them, and then agreed to make him whole in respect to the same lands elsewhere as those taken.

But, apart from the peculiar circumstances attending the contract between Valentine and the United States, and which of themselves secured him the right of selection elsewhere in the lands of the United States of the same class as those he relinquished, it is quite clear that the language of the act for his relief alone considered entitled him, or his legal representative, to select the "mud flats, bare at low water," described in the Record. (Par. 14, p. 19.)

Whatever answered the description of "unoccupied and unappropriated public lands of the United States, not mineral," and surveyed and unsurveyed, were subject to selection by Valentine or his legal representatives.

These mud flats undoubtedly fall within the description of "public lands of the United States." (*Infra*, p. 41.)

II.

Congress, by the act of 1872, for reasons of international obligations and public exigency, granted the scrip to Valentine and gave him the right to locate the same upon tide lands as well as uplands.

1. Miranda Grant Contained Tide Lands.

The Miranda grant is described as bounded on the north by Petaluma Rancho, on the east by the bay of San Pablo, on the south by the river of San Antonio, and on

the west by the Laguna of San Antonio; situated in Sonoma County and State of California; containing three square leagues of land, more or less; and, as appears from the public surveys and the map of the grant made by the General Land Office (p. 3), that a large part of the grant was tide lands.

It has been judicially recognized by the Supreme Court of California and this court that the Mexican government had the power of disposition of tide lands.

Techemacher *v.* Thompson (18 Cal., 12);
Ward *v.* Mulford (32 Cal., 366);
San Francisco *v.* Le Roy (136 U. S., 656);
Knight *v.* United Land Assn. (142 U. S., 161).

This court, in the case of Knight *v.* United Land Association (142 U. S., 161), citing from San Francisco *v.* Le Roy (136 U. S., 656), said:

"As to tide lands, although it may be stated as a general principle—and it was so held in Weber *v.* State Harbor Commissioners, 85 U. S.; 18 Wall., 57, 65; (21, 798, 801)—that the titles acquired by the United States to lands in California under tide waters, from Mexico, were held in trust for the future State, so that their ownership and rights of disposition passed to it upon its admission into the Union, *that doctrine cannot apply to such lands as had been previously granted to other parties by the former government*, or subjected to trusts which would require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos, *equally with those of individuals, were entitled to protection*, and proviston was made by Congress in its legislation for their investigation and confirmation. Townsend *v.* Greely, 72 U. S.; 5 Wall., 326, 337; (18, 547, 449). * * * Its (pueblo) rights were dependent upon Mexican laws, and *when Mexico established these laws she was the owner of tide lands as well as uplands, and could have placed the boundaries of her pueblos wherever she thought proper.*"

If California upon admission as a State, by virtue of sovereignty, acquired title to the tide-lands which had not been granted away, she would have taken the tide-lands in the Miranda grant instead of the United States, if the grant had been void, and the United States could not have disposed of them after the admission of the State.

2. Valentine was Dispossessed of the Miranda Grant by the United States.

Valentine was dispossessed of the Miranda grant by the United States, in violation of the provisions of the eighth article of the treaty of Guadalupe Hidalgo, of February 2, 1848, in which the United States stipulated to protect the property rights of all residents within the ceded territory in the same manner that the property rights of its own citizens were protected. (*Ante*, p. 3, top.)

The following decisions of this court assert the rights of the residents within the ceded territory and the obligations of the United States under said treaty.

In Boteller *v.* Dominguez, 136 U. S., 238 (32,927), Justice Miller said :

"By the treaty of peace known as that of Guadalupe Hidalgo, of February 2, 1848 (9 Stat. at L., 922), which closed the controversies and the war between the United States and Mexico, a cession was made of a very large territory by the Government of Mexico to the Government of the United States. This was a transfer of the political dominion and of the proprietary interests in the land; but the Government of Mexico caused to be inserted in the instrument certain provisions intended for the protection of private property owned by Mexicans within this territory at the time the treaty was made; and it may be conceded that the *obligation of the United States to give such protection, both by this treaty and by the law of nations, was perfect.*"

In Knight *v.* United Land Association, 142 U. S., 161 (35,982), *supra*, the court said:

"For it is equally well settled that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo (9 Stat. at L., 922), they were bound under the 8th article of that treaty to protect all rights of property in that Territory emanating from Mexican government previous to the treaty. Techemacher *v.* Thompson, 18 Cal.; Beard *v.* Federy, 70 U. S., 8 Wall., 478 (18, 85)."

"Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same. Soulard *v.* United States, 29 U. S., 4 Pet., 511 (7:938); United States *v.* Percheman, 32 U. S., 7 Pet., 51, 87 (8:604); Strother *v.* Lucas, 37 U. S., 19 Pet., 410, 436 (9:1137, 1147); United States *v.* Repentigny, 72 U. S., 5 Wall., 211, 260 (18:627, 643)."

In Hornsby *v.* United States, 77 U. S., 10 Wall., 224 (19, 904, 905), Justice Field said:

"The interest which passed by the grant, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, was a mere equitable or inchoate title, constituted property which the United States were bound to protect by the stipulations of the treaty of cession. That treaty provides for the protection of the rights of property of the inhabitants of the ceded territory. And independent of the treaty, they were entitled to such protection by the law of nations, according to which, as said by this court in Strother *v.* Lucas, 12 Pet., 436: 'The rights of property are protected even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect.' By the term 'property,' as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of Soulard *v.* United States, 4 Pet., 511."

In the U. S. *v.* Percheman, 7 Pet., 51, 87, Chief-Justice Marshall said:

"The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed."

It is evident that the attention of Congress was called to the following facts when the act for the relief of Valentine was under consideration, viz.:

1st. That the Miranda grant was a Mexican grant and was the property of Valentine.

2d. That the grant contained tide lands.

3d. That the United States dispossessed Valentine of the Miranda grant in violation of the treaty of Guadalupe Hidalgo.

It is therefore manifest that it was the *understanding and intention* of Congress to afford just and adequate relief to Valentine, and to accomplish this purpose it became necessary for the United States to either restore to Valentine the Miranda grant, with its tide lands, or grant him scrip which would take tide lands. That the grant of scrip was different from "any existing law"—as there was "no qualification as to the location of it" except mineral land—is evidenced by the question put by Mr. Taffe to Mr. Townsend, who had charge of the bill:

"Mr. TAFFE: I would like to ask the gentleman a question as to the character of the scrip which it is proposed to be given. I understand that it is not to be *issued under any existing law, and that there is no qualification as to the location of it*, whether surveyed or unsurveyed, minimum or double-minimum lands, the *only exception*,

I believe, being as to *mineral lands*. I should like that there were some indication as to the mode of location."

Mr. Townsend, in reply, after stating that the scrip was to be issued "in accordance with the provisions of *this act*," said:

"The United States have got the *very best lands in California from him*. They have sold them and put the money in the Treasury, and all this man asks is that he may have the opportunity, if he gains his case, of locating his scrip wherever he pleases on land which has not been taken by anybody, and in the legal subdivisions.

"*We have considered this matter very fully*. It has been considered in this House, it has been considered in the Senate, and it has received the sanction of the committees of each house. It has passed this House twice, and it meets the approval of the gentleman from California."

Mr. Sargent (of California):

"The Government of the United States, on the rejection of the Supreme Court of the right of intervention and the rejection of the Ortega grant, proceeded to sell to parties in possession, under its pre-emption and townsite law, this property, upon which is now situated the city of Petaluma. But any man, *I think, who examines the facts and ascertains the origin of this title, must concede that the Government had no right to sell that land; that the title was really in Miranda, and that some time or other justice must be done to the claimant*." (*Ante*, p. 5, 6.)

There were grave reasons why Congress preferred to grant tide lands to Valentine in exchange for the tide lands which the Government had taken from him, as it was an easy "mode of escape" from the obligations under said treaty which had been violated, and of the legal complications which would have been incurred with its grantees.

Mr. Justice Gray, speaking for the Supreme Court in Shively *v.* Bowlby, asserts in an elaborate opinion, delivthis term, the power of Congress to grant tide lands

in a territory, when it becomes necessary to perform international obligations. He said:

"*We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations,*" etc.

Again:

"The United States, while they hold the country as a territory, having all the powers, both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and unless in some *case of international duty or public exigency.*"

It is, therefore, aparent that Congress granted the tide lands to Valentine or his legal representatives for the reason that the United States had violated its obligations under the said treaty by dispossessing him of the Miranda grant which contained tide lands, and it not only became an "*international duty*" but a "*public exigency*" for the United States to grant scrip to Valentine which would enable him to select the same class of lands elsewhere, from the public lands, as those taken.

Congress has never evaded the obligations of the treaty of Guadalupe Hidalgo, and has directed the judiciary to be governed by the stipulations of said treaty, which is declared by the decision of this court in United States *v.* Aguisola, 1 Wall., 352 (17,616). Mr. Justice Field said:

"*The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded Territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals in passing upon the rights of the inhabitants to be governed by the stipulations of the treaty, the law of nations,*

the laws, usages, and customs of the former Government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property, which they claim, depended upon the nicest observance of every legal formality. *They have desired to act as a great nation,* not seeking, in extending their authority over the ceded country, to enforce forfeitures, but *to afford protection and security to all just rights which could have been claimed from the Government they superceded.*"

III.

The scrip and its location passed the fee out of the United States and vested it in the appellant, and conferred upon him the legal title as effectively as if it had been done by a patent.

Mr. Mann, the appellant, on September 18 and October 29, 1889, and those to whose title he succeeded, selected tracts of unoccupied and unappropriated public lands described in the amended bill (Record, 16, 17, 18, pars. 3, 4, 5th to 8th, and 9th to 12th), which are designated on the plats and surveys of the United States as "mud flats bare at low water." (Record, 19, par. 14th.)

These lands were selected by the location of the following certificates Nos. E, 222; E, 111, and E, 273, issued to Thomas B. Valentine, by virtue of a decree of this court rendered January 6, 1874, under said act of April 5, 1872 (17 Stat., 649).

Upon the location of the said Valentine certificates the register and receiver issued to Mann and those to whose title he succeeded certificates entitling him to patents therefor. (Record, pp. 29, 30.)

The Valentine Act of 1872 was a grant of land *in praesenti*. When the scrip was located upon the class of lands described in the act the fee passed from the United States and vested in the scripee as grantee, a patent would operate merely as record evidence of the title and add nothing to the title itself.

Wright *v.* Rosebery, 121 U. S. R., 488.

A perfect grant of land may be made by law without the issuing of a patent or any other documentary evidence of title.

Strother *v.* Lucas, 37 U. S., 12 Pet., 454 (9, 1154); Guynon *v.* Astor, 43 U. S., 2 How., 319 (11, 283); Ryan *v.* Carter, 93 U. S., 78 (23, 807); Morrow *v.* Whitney, 95 U. S., 55 (24, 456); Whitney *v.* Morrow, 112 U. S., 693 (28, 871); Rutherford *v.* Green, 15 U. S., 2 Wheat., 196 (4, 218); Fremont *v.* United States, 58 U. S., 17 How., 559 (15, 246).

The Circuit Court of the United States, in Larriviere *v.* Madegan (1 Dill, 457), where the question involved was the location of Sioux half-breed scrip on unsurveyed land, said:

"The location of the land with the scrip under the act of Congress of July 17, 1854, passed the fee out of the United States and vested it in the plaintiff as grantee.

"The scrip and application became the 'instruments of title,' and conferred upon him the legal title as effectually as could have been done by the issue of a patent."

The court is referred to appellant's first brief, pp. 11 to 19, for the decisions of this court as to the title conveyed by certificates issued by the Land Department.

IV.

The United States has the power of disposition of the tide lands in the Territories and Congress, by the Enabling Act of February 22, 1889 (25 Stat., 629), declared that the State of Washington shall not be entitled to any further grant of lands for any other purpose than was expressly provided for in said act.

1. The Enabling Act.

The act of February 22, 1889, which enabled Washington and the other States therein named to form constitutions and State governments, and be admitted into the Union, expressly provides the public lands which shall be granted to the States on their admission into the Union, as follows:

"In lieu of any claim or demand of said States, or either of them, under the act of September 20, 1850, and section 2479 of the Revised Statutes, making grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided in this act," etc.

And further:

"That the States provided for in this act shall not be entitled to any further or other grant for any purpose than as expressly provided for in said act."

And further:

"That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof."

Therefore the pretentions of the State of Washington to the ownership of the swamp and overflowed lands seem to be without foundation.

It was held by the Supreme Court in San Francisco *v.* Irwin (136 U. S., 578), that the swamp act of 1850, of which Washington is denied the benefit, included tide lands.

The court said :

"Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the *flow of tides.*"

2. The State's Claim.

The claim of the State of Washington to title in the tide lands is based upon the decisions of this court in Pollard *v.* Hagan (3 How., 213), and other Alabama cases, which, however, were not based upon an *implied trust*, but upon an *express* trust created by deeds of cession, by which the United States acquired title to the public lands in the State of Alabama, and this trust extended not only to the tide lands, but to all public lands, whether high or low, wet or dry.

The court said :

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama or any of the new States was formed, except for temporary purposes and to *execute the trusts created* by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the *trust created* by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana."

Again:

"The object of all the parties to these contracts of cession was to convert the land into money, for the payment of the debt, and to erect new States over the territory thus created; and *as soon as these purposes could be accomplished the power of the United States* over these lands as property was to cease. Whenever the United States shall have fully exercised these trusts, the municipal sovereignty of the new States will be complete throughout their borders, and they and the original States will be upon an equal footing in all respects whatever. We therefore think the United States hold the public lands within the new States by force of the deeds of cession, etc."

And again (229):

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States."

3. Origin of Title to the Public Lands in Alabama.

The State of Georgia after the revolution acquired all the rights in the navigable waters of the Territory of Alabama and retained the same, except when she surrendered to the United States by the adoption of the Constitution. She made a "deed of cession" in 1802 of the Territory of Alabama to the United States, in trust, to create Alabama a sovereign State.

The title of Alabama to the *soil* of her navigable waters depended upon the terms of the deed of trust from Georgia, which provides that "all right, title, and claim, as well of *soil* as of jurisdiction" (Pollard *v.* Hagan, 3 How., 222), be transferred to Alabama, and under that deed of trust *alone* the United States became trustee for the future State of Alabama.

If the deed of cession had expressly granted to the United States in fee-simple the title to the *soil* of all navi-

gable rivers, it would have been a valid grant, as the right of the State to sell it to individuals is the basis of the State's contention. The United States could be the grantee of the *jus privatum* as well as an individual.

It was decided in Pollard *v.* Hagan that the fee to the *soil* of the rivers was held in trust for Alabama and passed to her by the act of admission; that the patent of the United States for the tide lands by the act of 1836 (6 Stat., 680) passed no fee, because the United States had parted with its title by the act of admission of the State on an equal footing with the original States—that is, that the patent of the United States was void because, by the true construction of the deed of cession, the United States held the tide lands "in trust for the future State" by virtue of the deed of cession alone.

The court did not *even* decide that under the "deed of cession" a United States patent for the tide lands would have been void prior to admission. It was admitted that the United States had the right to sell all of the high lands, and nowhere denied that it did not have the right to dispose of the tide lands during Alabama's territorial period.

Mr. Justice Catron in a dissenting opinion in the same case said (p. 234):

"It has never been controverted that whilst the territorial government existed, any restrictions to give private titles were imposed on the Federal Government and, this in regard to any lands that could be granted."

In the case of Goodtitle *v.* Kibbe (9 How., 478) this court, through Chief Justice Taney, said:

"Upon a review of the case (Pollard *v.* Hagan) we see no reason for doubting its correctness, and are entirely satisfied with the judgment there pronounced."

And added:

"Undoubtedly Congress might have granted this land (*i. e.*, tide land) to the patentee, or confirmed his Spanish

grant, before Alabama became a State. But this was not done."

In Hallett *v.* Beebe (13 How., 25) the principles established in the cases of 3 How., 212 (Pollard *v.* Hagan), and 9 How., 477 (Goodtitle *v.* Kibbe), were again affirmed, viz.:

"That after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low-water marks."

Which certainly indicates that there was no lack of power in Congress to grant the lands between high and low-water mark *before* the admission of the State as held in Goodtitle *v.* Kibbe, 9 How., 478, *supra*.

The act of May 26, 1824 (4 Stat., 66) expressly granted tide lands, and the act of July 2, 1836 (5 Stat., 680), did the same. The latter act is a legislative construction of the former act, and the confirmation of title in the heirs of William Pollard.

The Supreme Court, in construing said acts in Pollard *v.* Kibbe (14 Pet., 353), held that Congress could grant the tide lands; and in Pollard *v.* Hagan (3 How., 212) the question was raised that as the "lands were below usual high-water mark at the time the State of Alabama was admitted into the Union, the act of Congress, and the patent in pursuance thereof, could give the plaintiff no title." (213.) The court then held that the United States passed no title by the act of 1836, because it had parted with its title by the act of admission of the State of Alabama into the Union, which was not a denial of the power in Congress to grant the tide lands.

The right of the United States to grant the tide lands is also judicially recognized in the case of United States *v.* Fitzgerald, 15 Pet., 407, where there was a claim under the pre-emption laws.

The legal principles established by this court in the Alabama cases appear to be as follows:

That the United States acquired all the lands in Alabama *in trust;* that it was subject to the disposition of Congress, during the territorial period, whether high or low, wet or dry; that Alabama, after admission, as successor to Georgia, became, by virtue of sovereignty, the owner of the shores and lands under navigable waters not previously disposed of by the United States.

4. Origin of Title to the Public Lands in California.

It was provided by the act of September 9, 1850 (9 Stat., 542), admitting California into the Union, as follows:

"The State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned."

The United States acquired title to the public lands in California from Mexico by the right of conquest, unincumbered with deeds of cession and express trusts, as in Alabama; therefore, the power of disposition of the public lands, whether high or low, wet or dry, was absolute and Supreme in the United States, and nothing passed to the State by virtue of admission but the lands flowed by the navigable waters—the *jus publicum* of navigation—which was held in trust for the future State.

In the case of Weber *v.* Harbor Commissioners (18 Wall., 57) Justice Field said:

"Although the title to the soil under the tide waters of the bay (of San Francisco) was acquired by the United States by cession from Mexico, equally with the title to the uplands, they held it only in trust for the future

State, upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State."

But the grant to be construed here was one made by the city of San Francisco, so that the case has no direct bearing on the question of the power of the United States to convey tide lands. An examination of the facts in that case, as to the character of the land in that suit, will show that the opinion had reference to land held by the State, as sovereign, in trust for public purposes.

The court says:

"The complainant's * * * land is situated nearly half a mile from what was the shore of the bay of San Francisco, at the time California was admitted into the Union, and over it the *water, at the lowest tide, then flowed at a depth sufficient to float vessels of ordinary size.*"

It is clear from the description that this land was subject to the *jus publicum* of navigation, which is held in trust for the future state, and passes from the United States to the State by the grant of admission.

The title of the United States to the tide lands in California was not hampered with any conditions, and if the United States disposed of any of this class of lands before the grant of admission, it would have been a valid grant; the decision nowhere denies the right of the United States to dispose of the tide lands before the grant of admission, and the decisions of this court in the Alabama, Virginia, Maryland, New Jersey, Massachusetts, and Oregon cases admit the right of the United States to dispose of the tide lands during the territorial period.

Pollard *v.* Hagan (3 How., 312);
Goodtitle *v.* Kibbe (9 How., 478);
McCreary *v.* Virginia (94 U. S., 391);
Smith *v.* Maryland (18 How., 71);
Manchester *v.* Massachusetts (139 U. S., 240);
Shively *v.* Bowlby (decided this term).

5. The Virginia, Maryland, New Jersey, and Massachusetts Cases.

In McCreary *v.* Virginia (94 U. S., 391), the court said:

"The principle has long since been settled in this court that each State owns the beds of all tide waters within its jurisdiction, *unless they have been granted away.* (Pollard *v.* Hagan, 3 How., 212; Smith *v.* Maryland, 18 How., 74; Munford *v.* Wardwell, 6 Wall., 436; Weber *v.* Commissioners, 18 Wall., 66.)"

In Manchester *v.* Massachussetts (139 U. S., 240), the court said, citing decision of the court in Smith *v.* Maryland (18 How., 59):

"Whatever soil below low-water mark is the subject of exclusive property and ownership belongs to the State on whose maratime border and within whose territory it lies, subject to any lawful grants of that soil by the State or sovereign power which governed its territory before the Declaration of Independence. (Pollard *v.* Hagan, 3 How., 212; Martin *v.* Waddell, 16 Pet., 369; Den *v.* Jersey Co., 15 How., 426.)"

The doctrine that the *proprietary* right to the soil is not a part of the *sovereignty* and is severable and salable is declared in Martin *v.* Waddell (16 Pet., 367, 416). The court said:

"Whatever he (the duke) had as a royal or prerogative right was restored, with the political power to which it was incident; and if the *great right of dominion and ownership* in the rivers, bays, and arms of the sea, and the soils under them, was to have been severed from the sovereignty and withheld from the crown * * * the design to make this important change in this particular Territory would have been clearly indicated by appropriate terms, and would not have been left for inference from ambiguous language."

Again (p. 416):

"And when the people of New Jersey took possession of the reins of Government and took into their own hands

the *powers of sovereignty*, the *prerogatives* and *regalities* which before belonged to the crown or parliament became immediately and rightfully vested in the State."

The distinction between *proprietary* title and the *sovereign* title in the tide lands is clearly stated in Hoboken *v.* Pennsylvania Railroad Company, 124 U. S., 681. The court said:

"That the public right is entirely distinct in it essential qualities of the State in land under tide waters. The former inheres in the State in its sovereign capacity. The latter is strictly proprietary. A grant of the *proprietary title* will never operate as a release or extinguishment of a *sovereign right* not necessarily involved within the scope of the grant."

It is clear that Georgia and New Jersey could have conveyed the tide lands in fee simple to the United States, if they chose to have done so, after the authority of Great Britain was overthrown and these States became themselves sovereign and in that character held the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general Government. (16 Pet., 367.)

The principles declared by the Supreme Court as to the ownership of the tide lands by the anti-revolutionary states are applicable to the ownership of the tide lands by the United States in territory acquired by the right of conquest, as in California, and by the right of discovery, as the State of Washington, where the United States is the absolute, original first proprietor and source of title of all the soils of navigable waters, occupying the same position as the King of England and the original States, and it has the same power of disposition. But it does not follow that the tide lands in the territories acquired by the United States otherwise than by deeds of cession,

must be held "in trust" for the future state, by an implied trust, unless the lands are subject to the *jus publicum* o navigation.

But notwithstanding the origin of title of the United States to the tide lands, this court has made clear, in its decisions, the legal fact that Congress has the power of disposition of the tide lands in the Territories, and that the States acquired title to them by virtue of admission into the Union, unless they have been granted away.

6. Origin of Title to the Public Lands in Washington State.

The title of the United States to the public lands in Washington is not based upon any deed or act of cession or treaty with any foreign nation, but originated in *discovery* of the country, which title is absolute and unqualified.

Judge Deady, in Case *v.* Toftus, 39 Fed. Rep., 730, said:

"The soil of Oregon was acquired by the National Government by means of the discoveries, explorations, and occupations of the citizens of the United States, and it was so acquired for the benefit of all and not a part. In Johnson *v.* McIntosh (8 Wheat., 595), Mr. Chief-Justice Marshall, in considering the effect of a discovery of an uninhabited country by persons who acknowledge some existing government, says:

"'The discovery is made for the benefit of the whole nation, and the vacant soil is to be disposed of by that organ of the Government which has the constitutional power to dispose of the national dominions.'"

The executive power of the Government in its contentions with other powers always claimed that we acquired Washington by virtue of discovery. (Greenlaw's Memoirs of North America, Sen. Ex. Doc. 174, 26th Cong., 1st sess., 185.)

In the case of Elam *v.* Neilson (2 Pet., 253), it was held that the claim of the political department of the Government is binding on the courts.

The disposition of the tide lands in the Territory of Washington by the United States was not hampered by any trust.

In the case of Shively *v.* Bowlby, decided this term, the Supreme Court again recognizes the right of Congress to grant the tide lands in the Territories. The court said:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition.

"We can not doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States."

As the appellee's brief is confined to the discussion of the *soil under navigable waters*, it is without application to the case at bar.

V.

The United States holds nothing in trust for the future State, but the jus publicum of navigation, which is the sovereign trust, the State acquires on its admission into the Union.

1. The Difference Between the Proprietary Right and the Sovereign Right.

The appellees and the State, in discussing the sovereignty theory, fail to make the distinction between lands flowed by innavigable and navigable waters; nothing but

the *jus publicum* of navigation can be held in trust for the future State; the *jus privatum*, or the right of private property, is always subject to the disposition of whatever government, national or State, is in authority.

It may be assumed that all lands are held in trust by the United States and the States respectively, but in a greater measure is it true of lands underlying navigable waters where the title is devisable and the rights dual, the *jus privatum*, or right of private property, and the *jus publicum*, or public right of navigation and fishery.

Chief Justice Shaw, in Commonwealth *v.* Alger (7 Cush., 92), said:

"It appears upon the authority of Lord Hale (*de jure Maris*) that in regard to the sea shore, arms of the sea and navigable waters, the King stood in two capacities, holding a *jus privatum*, or right of property, in the soil, and also a *jus publicum*, or right, as sovereign, to hold such property under his royal authority and power to regulate and govern for the common use and benefit of all persons for the purposes of navigation."

So that during the territorial period the United States has the power to sell or otherwise dispose of the *jus privatum*, and the donee or purchaser takes his title subject to the *jus publicum*, which is held in trust and not the subject of transfer; but where there is no navigation, as in the case of the lands of the appellant, there is no *jus publicum* involved and his title becomes complete.

When a State is admitted into the Union she accedes, by virtue of her sovereignty, to the *jus publicum* of navigation, and it is not inconsistent with her sovereignty that the *jus privatum* is held by another.

The distinction between the proprietary title and the sovereign title in the tide lands is recognized in the case of Hoboken *v.* Pennsylvania R. R. Co. (124 U. S., 681, *supra*, *ante*, p. 27). The principle is further recognized in

"The Chicago Lake Front Cases" (146 U. S., 387), where the court held:

"The bed or soil of navigable waters is held by the people of the State, in their character as sovereign, in trust for public uses for which they are adapted."

Therefore the claim of the State in its sovereign capacity is not to the *jus privatum* but to the *jus publicum*, or public right of navigation and fishery, which is a political and not a property right, and can not be alienated.

It was held in Commonwealth *v.* Alger (7 Cush, 70), *supra*:

"The word 'proprietary' is nearly equivalent to 'property.' It imparts not an easement, in incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to an interest in the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest."

The grant of the *jus privatum* by Congress to an individual during the territorial period does not operate to impair the sovereign power of the future State, for the reason that the land granted would remain subject to the *jus publicum*; that is, the title to the land would vest, but it would be subject to the public right of navigation, if any existed.

It was held in the case of Treat *v.* Lord (42 Maine, 560:

"The right of property is one thing and the right to regulate or control the use of property, *pro bono publico*, by appropriate legislation, is quite another thing. *The first is property* subject to be conveyed by deed or other legal mode of disposition; but *the last* is part of the sovereign power itself."

The State of Washington's prerogative right is not impaired by the proprietary interest in these lands passing into private ownership, as the State itself proposes to sell

the land by the act of the legislature entitled, "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington."

It is provided—

"SECTION 1. The tide and shore lands in the State of Washington shall be appraised, and the same shall be disposed of by the commissioner of public lands as in this act provided." * * *

Approved, March 26, 1890.

The principle is stated with great clearness and force in Case *v.* Toftus (39 Fed. Rep., 730, *supra*), as follows:

"In the Territories the National Government is both sovereign and proprietor. Congress has the power to govern them and in doing so exercises the combined power of the National and State Governments. (Insurance Co. *v* Carter, 1 Peters, 542), and as such sovereign and proprietor it may dispose of all public land in the territory, whether high or low, wet or dry. For the time being, as sovereign, it has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the *jus privatum*, or right of private property, subject to the *jus publicum*. (Gould on Waters, sec. 17.) This *jus publicum*, whether held by the National Government during the territorial period or the State thereafter, may be sold or disposed of by either who represent the public."

The Supreme Court in the case of Irwin *v.* San Francisco Savings Union (136 U. S., 578; 34, 540,) *supra*, where the question involved was the title of the State of California to tide flats capable of reclamation by embankment, the same class of lands as in the case at bar, held in substance:

"That the title to the land passed to the State by act of Congress of September 28, 1850 (9 Stat., 579), and not by virtue of her sovereignty."

Which is a recognition of the doctrine that the sovereignty of the State only exists over lands underlying *navigable waters* of the State, and not over flats susceptible of reclamation; that is, where there is no navigation, there is no *jus publicum*, and where there is no *jus publicum* there is no sovereignty.

As it has been established that the lands in controversy are "public lands" (*infra*, p. 41), and that the waters over them are innavigable, consequently there is no *jus publicum* and no sovereignty involved, which makes the investure of title to the lands in the appellant complete; but if the waters over the land were navigable, the title of the appellant would be held subject to the *jus publicum* of navigation, and upon the State's admission to the Union the trusteeship of the *jus publicum* would be transferred from the United States to the State subject, however, to the paramount sovereignty of the United States under the commerce clause of the Constitution. (Gibbon *v.* Ogden, 9 Wheat., p. 1.)

In Shively *v.* Welch (20 Fed. Rep., 28, 32) the court said:

"The land in the Territory of Oregon, including the beds and shores of navigable waters below ordinary high tide or water, belonged, prior to the admission of the State into the Union, to the United States as *proprietor*, and was subject to its jurisdiction as sovereign, upon the admission of the State into the Union, *such bed and shores not otherwise disposed of by the United States* became the property of the State in its sovereign capacity, and subject to its jurisdiction and disposal."

But the enabling act, admitting the State of Washington into the Union, declared that the State is not entitled to any further grant of lands for any purpose than was expressly provided for in said act, and that the provisions of the act of September 20, 1850, and section 2479, Rev. Stat., making grant of swamp and overflowed lands to certain States, did not extend to the State.

By the act of admission the "inherent sovereignty," or the trusteeship of the *jus publicum*, passes from the United States to the State, and where there is no navigation the *jus privatum* investiture is complete; but where there is navigation there is no impairment of the *jus publicum* by the grant of the *jus privatum*, as the latter title is held subject to the former.

There is no more danger of the United States "wielding the weapon of sovereignty" over the tide lands in the territory "to the injury of the State" than there is in the State itself "wielding the weapon of sovereignty" over the same class of lands to the injury of its own sovereignty.

The expressions used in the Federal decisions that a State must be admitted into the Union on "an equal footing with the original States," has reference to political equality; the grant of the tide lands in a territory does not effect the future State's equal footing with the original States, as whatever tide lands the United States granted away would be subject to the State's sovereignty, after admission, if any existed; it no more impairs the State's "equal footing" for the United States to grant the tide lands in a territory than it does for the State to grant them after admission, as the sovereignty which grants them, is the same, whether it is wielded by the United States or the State.

2. The Land in Controversy.

The tract of land in controversy which the State asserts a proprietary interest, is neither the shore of a navigable water nor is it flowed by navigable water; it is denominated by the Coast and Geodetic Survey "mud flats, bare at low water." (Record, par. 14, p. 19.)

The land is tide flats, or mud flats, composed of alluvial soil, deposited by the Puyallop River into Commencement Bay, which is becoming derelict by the accumula-

tion of this soil-mud. The lands can not be used for the purposes of navigation, but are barriers to it. "Navigability in fact," and not the ebb and flow of the tide, has been accepted in this country as the test of "Navigability in Law." As this land is not flowed by waters navigable in fact, there is no *jus publicum* over them; therefore the State's sovereignty is not impaired by the land being disposed of by the United States to the appellant. (*Infra*, p. 39.)

These tide flats, or mud flats, are capable of reclamation by dyking, and are properly "public lands" of the United States, subject to entry under either the special or general land laws of the United States.

If the State, on admission, acquired a "proprietary" interest in the tide lands, by virtue of sovereignty, under the authorities, she could only take those lands which had not been previously granted away.

McCreary *v.* Virginia, 4 Otto, 391;
Smith *v.* Maryland, 18 How., 74 (bot.);
Manchester *v.* Mass., 139 U. S., 240;
Shively *v.* Welch, 20 Fed. Rep., 32;
Teschamche *v.* Thompson, 18 Cal., 11.

As the appellant's title to the land was acquired from the United States *prior* to November 11, 1889, the date of the President's proclamation admitting Washington into the Union, and as found by this court in Prosser *v.* N. P. R. R. Co., decided this term, his title and interest in the land was not affected by the grant of admission.

And furthermore, the State of Washington, by its constitution, recognizes this power of disposition by the United States when it "disclaims all title in and claim to all *tide, swamp, and overflowed lands patented* by the United States."

Sec. 2, Article XVIII, Const. Washington.

VI.

The line of "navigability in fact," under the Federal decisions, has become the line of demarkation between the State's ownership of soil by virtue of sovereignty and the proprietary interests of the United States.

1. The Sovereignty of United States Supreme.

The Constitution was ordained and established by the *people* of the United States, and not by the States in their sovereign capacity.

Martin *v.* Hunter (1 Wheat., 324);
McCullough *v.* Maryland (4 Wheat., 316);
Cohens *v.* Virginia (6 Wheat., 264).

By this action of the *people* in adopting the Constitution the States were shorn of all rights which were not secured to them by that instrument, among which was the right to control in any manner the *public lands* or other public property of the United States. (Art. III, sec. 3, of Con.)

The reason assigned at common law for putting title in the King, and giving him dominion over the sea and its shores, was that "he had a right of empire or government over it in reference to the safety of the kingdom and his customs."

Likewise, under the Constitution, the duty of providing for the general safety and the customs revenue is in the general Government. Section 8 of the Constitution defines the power of Congress in promoting the public good and general welfare.

The following decisions of the Federal courts assert the supremacy of the United States:

In the case of Ableman *v.* Booth, 21 How., 506, the court said:

"Although the State of Wisconsin is sovereign within its territorial limit to certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States."

In Kohl *v.* United States, 91 U. S., 367, the court said in substance:

"The power of the United States Government to appropriate lands or other property within the States for its own uses and to enable it to perform its proper functions is essential to its independent existence and prosperity. * * * The power vested by the Constitution in the General Government demand for their exercise *the acquisition of lands in all States.*"

Cooley Cons. Lim., p. 526, says:

"So far as the General Government may deem it important *to appropriate lands* or other property, * * * the General Government may exercise the authority as well within the States as Territories."

In Legal Tender Cases, 10 Wall., 457, the court said:

"The United States is not only a Government, but it is a National Government and the only Government in this country that has the character of nationality. * * It has jurisdiction over all these general subjects of legislation and sovereignty which effect the interests of the whole country equally and alike, * * * such as coinage, weights, and measures, bankruptcy, the postal system, patent and copyright laws, *the public lands*, and interstate commerce, all of which subjects are expressly or implicably prohibited to the State governments."

In Pensacola Tel. Co. *v.* Western U. Tel. Co. (6 Otto, 1), the court said:

"The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction; it legislates for the whole nation, and is not embarrassed by State lines."

Gilman *v.* Philadelphia (3 Wall., 724), the court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than that in which they lie. For this they are public property of the nation, subject to all the requisite legislation of Congress."

In South Carolina *v.* Georgia (3 Otto, 4), the court said:

"The power to regulate commerce conferred by the Constitution upon Congress is that which previously existed in the States."

In Stockton *v.* Railway Co. (32 Fed. Rep.) Justice Bradley said:

"If it be necessary, the United States Government should have an eminent domain still higher than that of the State, in order that it may carry out the objects and purposes of the Constitution, then it has it; whatever may be the necessities or conclusions of theoretical laws as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full and complete power to carry out its purposes."

And, on submerged shoals and flats, the court said:

"*It is also true that portions of the submerged shoals and flats, which really interfere with navigation and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose.*"

It is evident from the foregoing decisions that the original or anti-revolutionary States as successors in the ownership to the *jura regalia* of the crown acquired under the Constitution no property in the shores and beds of tidal waters. The duties of government were devolved by the Constitution upon the United States, in regard to

the common defense and the collection of custom revenues, and by the principles and reasons of the common law, invested the new government with the prerogative or *regalia* rights and ownership of such beds and shores.

2. Common Law Distinction between the "Bank" and "Shore" of a Navigable Water Obliterated.

The Federal courts have changed the doctrine of the common law by extending the admiralty and maritime jurisdiction of the United States over non-tidal waters that are navigable, which places the beds of navigable non-tidal waters on the same basis as the beds of navigable tidal waters, which have been added to the "*jura regalia*" by reason of their "navigability" *alone*. The ebb and flow of the tide, under the common law, determined the "public" character of the water, while under the Federal decisions the "public" character of the water was determined by "navigability in fact," which became the test of "navigability in law," and tidal waters that were navigable and non-tidal waters that were navigable were placed upon the same footing, and as a consequence where "navigability in fact" ended, there "the prerogative rights of sovereignty" likewise ended.

In the leadng case of Genesee Chief (12 How., 444), it was decided that the admiralty and maritime jurisdiction of the United States is not limited to tide waters but extends to all lakes and navigable rivers. The court said:

"And certainly there can be no reason for admiralty power over a public tide water which does not apply with equal force to any other public water used for commercial purposes and foreign trade."

In the case of the United States *v.* Montello (11 Wall., 411), the court said:

"This court held in the case of *The Daniel Ball* (10 Wall., 557), that those rivers must be regarded as *public navigable* rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In Miller *v.* Mayor (109 U. S., 385), the court said:

"By *navigable waters* of the United States are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign nations or among the States."

In Barney v. Keokuk (94 U. S., 323), the court said:

"And since this court in the case of Genessee Chief *v.* Fitzhugh (12 How., 443), has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of navigable waters and amenable to the admiralty jurisdictions, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores.*"

In the light of the Federal decisions, it is evident that the common-law distinction between the "bank" and the "shore" of a navigable water has been obliterated, and the doctrine upon which the *jura regalia* was based, so far as title to, and ownership of, the "shore" is concerned, has likewise been destroyed.

Many of the States have granted the "shores" to the owner of the adjacent land (Maryland, Virginia, Massachusetts, and other States have done so), which is an admission that the State ownership is not necessary to navigation. The State of Washington has passed an act for the sale of its tide lands. (*Ante*, p. 32.)

So that "navigability in fact" becomes the test of the *jura regalia*, and the line of interference with navigation

is therefore the natural line of the State's ownership, and, as has been shown, the power to regulate navigation is an incident of the power "to regulate commerce," hence the extent of the "ownership of the Stats based on sovereignty" is to be determined by Congress.

It is apparent that the rules of the common law placed the title to the shores and beds of arms of the sea in the King, with power of disposition. The ebb and flow of the tide determined the character of the water; but the Federal courts have, by the adoption of the rule of "navigability in fact" as the test of "navigability in law," discarded the common law for determining the public character of the water; and have, of course, discarded with it the test of the *jura regalia*, which at common law was the ebb and flow of the tide, and the line of the "State's prerogative" has become the line of "navigability in fact." Where there is no navigation in fact, there is no State ownership by virtue of sovereignty.

VII.

The tide lands lying within the Territories have always been disposed of by the United States as other public lands.

1. Public Lands Include Tide Lands.

The lands upon which Mann located his scrip are designated on the plats and surveys of the United States as "mud flats, bare at low water." (Par. 14, Record, p. 19.)

It is admitted that the lands are unoccupied and unappropriated, are not mineral, and are unsurveyed Therefore, are they "public lands subject to the location of Valentine scrip?"

The term "public land" is clearly defined by law; it is declared in sec. 2257, Rev. Stat.:

"All lands belonging to the United States," with certain exceptions not material here, "shall be subject to the right of pre-emption."

The United States disposed of the tide lands in the Miranda grant as other public lands, and Congress approved the same by the act of 1872 for Valentine's relief, which is equivalent to legislative declaration that "*tide lands are public lands.*"

Mr. Justice Brewer, in the case of the Union Pacific Railway *v.* Douglass (31 Fed. Rep., 540), said:

"The term 'public lands' has become, by settled construction, descriptive of those lands only which are in no manner reserved for any purpose."

And in Newhal *v.* Sanger, 92 U. S., 736, the court said:

"The words 'public lands' are habitually used in our legislature to describe such as are subject to sale or other disposal under general laws."

The legislative construction of the term "public lands" is applied to all classes of land belonging to the United States within the public domain, as appears by the laws of Congress.

The *public surveys* in Oregon and Washington Territory were made to *low-water mark* by the direction of the General Land Office, from August, 1853, to April, 1875, and from that period to 1889, the year the scrip was located, the surveys were "left to the Surveyor General's sound judgment and knowledge of the demands of settlers," and by the act of March 2, 1889, "*preference* shall be given in favor of surveying townships occupied in whole or part by actual settlers," and under this authority the tide lands were surveyed and sold as other public lands. (First Brief, pp. 23, 24.)

The Puyallup, Lummi, Quinailet, Swinomish, and Snohomish Indian Reservations in Washington Territory

were extended to *low-water mark* by the order of the President in 1872 and 1873. ("Executive Orders Establishing and Defining Existing Indian Reservations November 1, 1882 edition," and Parsons' Brief, pp. 26–28, filed in this case.)

Now, then, *when Congress* passed the act in 1872 *granting tide lands* to Valentine *the Land Department* was surveying, selling, and *patenting tide lands to settlers* (1st Brief, 22 mid.) and *the President was ordering* that the *Indian Reservations be extended to low-water mark.*

It is evident, therefore, that it is the policy of the Government to dispose of the tide lands, in the Territories, as other public lands.

2. Congress has never prohibited the disposal of the tide lands.

By the provisions of the town-site act of March 3, 1863 (12 Stat., 754, secs. 2380, 2381, Rev. Stat.), the tide lands on Puget Sound, in Washington, were surveyed and sold as public lands.

The act provides that—

"The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, junction of rivers, important portages," etc., which reservations were "to be surveyed into urban or suburban lots, * * * for sale at public auction to the highest bidder, and thence afterward to be subject to sale at private entry."

Under this authority the President created the reservation of Port Angeles, in Washington Territory (Land Laws, U. S., vol. 2, p. 1182), which included land to *low-water mark,* subdivided and sold the same at private entry. More than one hundred lots were sold lying between high and low-water mark. (Records Port Angeles town site, G. L. O., Div. G.)

The Department of the Interior, in executing the laws of Congress for the disposition of the public lands, has always treated the tide lands or mud flats as "public lands," and has surveyed and sold thousands of acres in the Territories, and even in the States; instance, the lands contained within the Miranda grant, and the swamp and overflowed lands under the act of Septemper 28, 1850 (9 Stat., 519).

When Washington was a Territory, the Government disposed of hundreds of acres of tide lands or mud flats in townships 32, 33, and 34 north, ranges 2, 3, 4 east, W. M., they were entered and patented under the homestead and pre-emption laws.

In the field notes of the surveys of General Land Office, Seattle district, Washington, these lands are described as follows:

"*Land, tide prairie, subject to overflow at high water two to four feet.*" (Vol. 22, pp. 195–197.)

"The land in this township (Tp. 34 N., R. 3. E., W. M.) is mostly level, and a large portion of it is subject to inundation by the Skagat River overflowing its branches. The banks of the river are generally higher than the surrounding country, and yet above the large drift it appears to be subject to frequent inundations from one to three feet deep. * * * * * *The west part is tide prairie from one to two miles wide, and it is thought may be secured by dykes against inundation by high tides. There are already some settlers on these prairies who have expended considerable money and labor on dyking; these flats should, therefore, be subdivided.*"

"The low lands and bottoms are rich. *The tide prairie, specially when dyked, will make good farming lands.*" (Vol. 22, p. 103.)

And there are tide lands situate in Commencement Bay, near by the lands of the appellant, which were disposed of by the Secretary of the Interior under general laws and patented as other public lands—these lands

are now partly occupied by an extensive saw mill and are still flowed by the daily tides. (First Brief, pp. 22, 23.)

Therefore, if the United States did not have the power to dispose of these tide and overflowed lands in Washington when it was a Territory, then the titles to thousands of acres of this class of public land are null and void.

3. Opinion Below.

The opinion below alleges (Rec., pp. 24, 25):

1. That under the land laws the surveys of the public lands terminate at the line of ordinary high tide on the shore of the sea.

2. That an entry of Valentine's scrip can not be made on mud flats bare at low tide, situated in Tacoma harbor.

3. That the land in suit was regarded by the official surveyor as being not land at all, but as water.

The bill and evidence in suit, which the appellee admits by demurrer, establishes the exact facts; therefore, the opinion of the court is erroneous, and is refuted by the acts and policy of the Government in conducting the public surveys and in disposing of the public lands in the Territories.

The *Land Department*, which is responsible for the public surveys, *directs* the *surveys to be made to low-water mark*. (*Ante*, p. 42.)

The Valentine scrip in this case has been located on "mud flats, bare at low water" (Record, p. 19, par. 14), and are absolutely *innavigable*, therefore *could not be a part* of the "Tacoma Harbor."

Webster defines a harbor to be "A *port* or *haven* for ships; a bay or inlet of the sea, *in which ships can moor*,

and be sheltered from the fury of the winds and a heavy sea ; *any navigable water where ships can ride in safety.*"

The "official surveyor" describes this class of land, "*Land, tide prairie subject to overflow by high tides, may be secured by dikes, will make good farming land.*" (*Ante*, p. 44.)

Conclusion.

Congress *intended to grant scrip* to Valentine or his legal representatives, which could be *located* upon *tide land, on consideration* of the Miranda grant, which included tide land, and for reasons of international duty, public exigency, as well as common justice.

In the language of this court in United States *v.* Moreno (1 Wall., 450)—

"No nation can have any higher interest than the right administration of justice."

THEODORE H. N. MCPHERSON,
Of Counsel for Appellant.

153 U.S. 273
287

Office Supreme Court, U. S.
FILED.
APR 12 1894
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

JACOB C. MANN,
vs.
TACOMA LAND COMPANY
AND
WILTON L. BAER,
Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY,
A CORPORATION,
Defendants in Error.

No. 375

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Writ of Error to the Supreme Court of the State of Washington.

BRIEF OF INTERVENOR, LOUIS LANGIE.

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ROBERTS & SON, PRINTERS.
1894

STATEMENT.

Louis Langie, by leave of the court first had and obtained, files this his brief in intervention in the above entitled cases.

The intervenor herein claims title to a non-mineral tract of tide or mud-flats in Elliott's or Duwamish Bay, Washington, by virtue of locations of scrip thereon, on the 16th and 18th of October, 1889, issued to intervenor under the Act of Congress approved July 17, 1854 (10 Stat. 304), and prior to the admission of Washington as a state, November 11, 1889. The said locations were accepted by both the local and General Land Offices. Subsequently each of said offices reversed its own action, and said claim is now pending before the Secretary of the Interior.

STATUTES.

Article XVII of the Constitution of the State of Washington is as follows:

"SEC. I. The State of Washington asserts its ownership in the beds and shores of all navigable water in the State up to and including the line of ordinary high water where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. * *

"SEC. II. The State of Washington disclaims all title in and claim to all *tide, swamp and overflowed lands* patented by the United States. Provided the same is not impeached for fraud."

Article XV of the Constitution provides for a commission to locate and establish harbor lines in the navigable waters of all harbors, etc., wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side, and also as follows: "The State shall never give, sell or lease to any private person, corporation or association, any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine), be sold or granted by the State, nor its right to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

Section 2 of the same article provides for the passage of general laws for the leasing of this reserved strip, for terms not longer than thirty years, with the right to build wharves and

other structures, or that the State itself may build such wharves and other structures.

Section XVII of the enabling act (25 Stat. at Large p. 676) provides that the grants made therein were "in lieu of any claim or demand by said State, or either of them, under the act of September, 28, 1850, and Section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared, is not extended to the States provided for in this act. * * *" "That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided for in this act."

"July 17, 1854. *Chap. LXXXIII* 10 *Stats.* 304.—*An Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed bloods of the Dacotah or Sioux Nation of Indians, and for other purposes.*

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:* That the President be, and he is hereby, authorized, to exchange with the half-breeds or mixed-bloods of the Dacotah or Sioux Nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit, by the ninth article of the Treaty of Prairie Du Chien, of the fifteenth day of July, one thousand eight hundred and thirty; and for that purpose he is hereby authorized to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation,

certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed-bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by the government, upon which they have respectively made improvements: *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: *And provided further*, That no transfer or conveyance of any of said certificates or scrip shall be valid.

"SEC. 2. *And be it further enacted*, That the President be, and he is hereby authorized, to cause to be ascertained the number and names of the half-breeds or mixed-bloods who are entitled to participate in the benefits of the said grant or reservation as aforesaid, before the issue of the certificates or scrip provided for in the preceding section.

"SEC. 3. *And be it further enacted*, That from and after the passage of this act, the President is authorized to have the lands within the said reserve surveyed and exposed to public sale at the Land-Offices for the districts in which said lands may lie according to the boundaries of the several land districts recently established by Congress, in the same manner as other public lands.

"*Approved, July* 17, 1854."

CIRCULAR.

"*Relative to the location of half-breed Dacotah or Sioux scrip, issued under the Act of Congress approved July* 17, 1854.—*U. S. Stat. at Large, Vol.* 10, *p.* 304.

"GENERAL LAND OFFICE,

"February 22, 1864.

"Gentlemen:—Questions frequently arise in regard to the location of Dacotah or Sioux half-breed scrip issued some years ago from the office of Indian affairs. * * *

"The land selected in satisfaction of a certificate of scrip must of course be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian or duly authorized agent. The application should be duly attested in each case by the Register and Receiver, and attached to each should be your certificate to the following effect:—

'LAND OFFICE AT....., '

'....., 1864.

'We hereby certify that the within scrip has, this.....day of ....., been located on the ..... containing ..... acres, agreeably to the act of 17th July, 1854, and by the party duly authorized to make the location.

'Attest: '....., Register.'

'....., Receiver.'

"*No receipt is to be issued to the locator*, except in unavoidable cases, where there may be a small excess in the area of the location over the scrip, and in that case it must be paid for, and the receiver will issue his receipt, which he will number and account for, as in the case of bounty-land warrant excess. *But no certificate of purchase is to be issued; the scrip and application, instead of certificates of purchase, being the instruments of title which are to be returned to the General Land Office in this class of business.*

"Very respectfully, your obedient servant,

"J. M. EDMUNDS, Commissioner."

ASSIGNMENT OF ERROR.

The Court below erred in holding that the lands in question were not public lands of the United States.

BRIEF.

THE ACTS OF JULY 17, 1854, AND APRIL 5, 1872.

The decisions rendered by the Land and Interior Departments in the cases now before this Court in this proceeding, were all based upon the hypothesis that the acts of Congress above named, were merely "grants" or "gifts" from the United States to the Sioux Nation and Valentine, and as such subject to the usual rules of construction against such grantees and beneficiaries.

The acts of July 17, 1854, and April 5, 1872, were not "gifts" or "grants" at all in their accepted meaning, but they were "exchanges" of equal interests in lands, one for the other, based upon legislative contracts or agreements proposed and entered into by the United States for its own peculiar purposes and advantage, with the Sioux Nation and Thomas B. Valentine respectively.

By the first named "exchange" the United States received from the Sioux their rich reservation along the shores of Lake Pepin, embracing prairie, timber and swamp lands, together with the mud-flats or shallows found in that large lake.

By the second "exchange," the United States received from Valentine the enormously valuable Miranda Grant, also embracing areas of tide or mud-flats. All of this grant has likewise been disposed of by the United States.

An "exchange" is defined to be "a mutual grant of equal "interests in land, the one in consideration of the other."

2 Black's Comms., 323.
Sheppard Touchst., 289.

The terms "grant" and "gift" are wholly different from an "exchange." The former are nearly synonymous, and neither imports any consideration, for which reason the conditions of a "gift" or "grant" are always construed most strongly against the grantees, whereas an "exchange" of necessity imports a valuable consideration, and its conditions are always to be liberally and beneficially expounded.

The titles of both parties to an exchange also vest immediately. The decisions of this court have definitely settled the question as to when a grant in words of the present takes effect, and still more must it apply to an "exchange," the very use of which term forbids the idea that the titles of either party should remain in abeyance.

In Wright vs. Roseberry (121 U. S. 488) it was *held*, that, "The grant of swamp and overflowed lands to the several states by the Act of September 28, 1850, is one *in præsenti*, passing title to the lands of the character therein described, from its date, and requiring only identification thereof to render such title perfect." The court said (p. 497) "There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself."

In Langdeau vs. Hanes (21 Wall. 521), the court, referring to the issuance of a patent, *said* it "would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quie

and security. But it would have added nothing to the force of the confirmation. The *survey required for the patent was only to secure certainty of description* in the instrument. * *"

Further rulings to like effect will be found in the following cases: Leavenworth L. & G. R. R. Co. vs. U. S., 92 U. S. 733, wherein the court, referring to the language of the statute that, "There be and is hereby granted to the State of Kansas," said: "It creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted,' are words of absolute donation and import a grant *in præsenti*. * * * They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them."

See also

R. R. Co. vs. Baldwin, 103 U. S., 426.

M. K. & T. Ry. vs. K. P. Ry. Co., 97 U. S., 491.

Schulenberg vs. Harriman, 21 Wall. 44–60.

In Wright vs. Roseberry, *supra*, 503, the language of Attorney General Black is quoted (9 Op. Attys. Genl. 254), from his opinion to the Secretary of the Interior: "In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject matter of the grant, *except what is expressly excepted.*" * * It is not necessary that the title should issue before the title vests in the State under the act of 1850. The Act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect. * * * But when a party *is authorized to demand a patent for land his title is vested as much as if he had the patent itself*, which is but evidence of the title."

The same view has been held by the highest courts of several states wherein swamp and overflowed lands are found.

See

Fletcher vs. Pool, 20 Ark., 100;
Branch vs. Mitchell, 24 Ark., 431–444.
Ring's Executor vs. Rotau's Heirs, 29 Ark., 56.
Owens vs. Jackson, 9 Cal., 322.
Summers vs. Dickinson, 9 Cal., 554.
Allison vs. Halfacre, 11 Iowa, 450.

In Larriviere vs. Madigan, 1 Dill. 455, it was *held*, that "The location of the land with scrip, under the Act of Congress "of July 17, 1854, passed the fee out of the United States, and "vested it in the plaintiff as grantee. The scrip and application "became the instruments of title, and conferred upon him the "*legal* title as effectually as could have been done by the issuing "of a patent. * * * The location with the scrip, being in "my opinion, equivalent to patent, gives a better title than the "pre-emption entry." (See 13 Peters 516; 20 How. 566; 11 How 568; 13 How. 24; 2 Johns 84, 222).

THE PUBLIC DOMAIN.

It is assumed that whatever lands are not "reserved" or excepted out of the mass of the public domain, and made subject to disposition under some special law, constitute the lands of the United States subject to disposition under general laws, and are such as are usually termed the "public lands."

RESERVATION DEFINED.

"Reservation" or "appropriation," was defined by this Court as follows: "Now this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use."

Wilcox vs. Jackson, 13 Pet. 499–515.

TIDE LANDS.

Tide-lands have never been "reserved" for any "particular use" from appropriation by any law, nor distinguished from the rest of the public lands so far as to have provided any special method of disposing of them, as is the case with other classes of "reserved lands," such as mineral lands, school, etc.

That tide-lands or flats have been disposed of by the United States in vast quantities, extending over a period of nearly a century, is matter of record that cannot be questioned.

The clearest evidence that non-navigable tide or mud flats, of the character of those in Elliott's or Duwamish Bay, Washington, and similar areas in San Pablo Bay, referred to by this Court in the case of San Francisco Savings Union vs. Irwin, were never regarded as other than part and parcel of the "public lands," is found in the facts, that outside of Washington, nearly, if not quite, the entire area of such mud-flats has actually been surveyed by express direction by the government, and either granted directly to the States named, in various acts of Congress, under the act of September 28, 1850, or else disposed of to individuals under scrip and warrant locations, the donation, pre-emption and other land laws.

TIDE OR MUD-FLATS DISTINGUISHED FROM THE ORDINARY *LITTUS MARIS.*

The mud-flats in Elliott's Bay are to be distinguished from the narrow margins that form what is strictly and usually meant by the *littus maris* or sea-shore proper. They consist, as the coast survey, and other maps in evidence in the case show, of about 3,000 acres, covering an area about two miles by two and one-half miles in extent, nearly all of which is totally useless for purposes of navigation. In no proper sense are the waters

covering them, "navigable waters," nor does this immense area, embracing fully one-half of Elliott's Bay come within the term "shores of navigable waters" used in Pollard vs. Hagan. The "navigable waters" of Puget Sound undoubtedly include the narrow *littus maris* above described, but do not extend to mere mud-flats, so extensive in area, as to invoke as of themselves the application of the American doctrine that over such areas of waste, navigability in fact constitutes navigability in law, as against the common-law doctrine that all waters subject to the ebb and flow of the tide are navigable in law.

It is to the *littus maris* proper of waters navigable in fact that the doctrine of State sovereignty properly applies, because access to the sea, or other public rights may be involved, the preservation of which would devolve upon the State as a public trust. But there can be no such thing as riparian rights involving any public trust or right, across two or three miles of mud-flats.

This distinction is recognized by the State of Washington itself in its own laws for the disposition of tide-lands claimed by it. By the act creating the State Board of Land Commissioners, it is provided in Sec. 7, that such lands shall be classified as follows: * * * "(3). Overflowed lands, and *shore*, and *tide-lands*. (4). Harbor line areas or rims."

Under the Constitution of the State the 4th class is not the subject of sale, and can only be leased for terms of years, subject, of course to any *jus publicum* involved. But the 3rd class is for absolute sale, and may be filled or otherwise improved and re-claimed by the purchaser. This is conclusive evidence that no *jus publicum* over this area exists, or else that, if any does exist, the State abandons it for the sake of improving the rest of the harbor, as it may do.

In Stockton vs. Railroad Co. (32 Fed. Rep. 19), Mr. Justice Bradley said: "It is also true that portions of the submerged shoals and flats, which really interfered with navigation and

could better subserve the purpose of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose."

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and so long as their disposition is made for such purposes, no valid objections can be made to the grants."

Ill. C. R. R. Co. v. Illinois, p. , Oct. Term, 1892.

The lands claimed by intervenor belong to the third class above referred to.

TIDE-FLATS ARE NOT "UNSURVEYABLE," BUT ARE PUBLIC LANDS.

It is also urged as another reason against the disposition of tide-lands that they are "unsurveyable,"—*i. e.*, that they "belong to a class over which it is not contemplated to extend the public land surveys."

But it appears that in 1853 the Land Department issued instructions to its surveyors general to extend the public surveys to low-water mark within the tidal land regions. These instructions remained in force till April 14, 1875, a period of twenty-two years, during which both the acts of July 17, 1854, and April 5, 1872, became laws.

And it may be fairly assumed that during that long period large areas of tide-flats in Oregon were actually "surveyed" and disposed of. Certainly they were regarded as "surveyable," and consequently as belonging to the class of "public lands" subject to the operation of general laws.

It is also not unfair to assume that as such lands were both before and till long after the passage of both acts aforesaid,

"surveyable," it must have been intended to include them in the "exchanges" then made. Indeed tide-flats appear to have had so little value that they were never sought to be "reserved," till now, from the operation of general laws.

It thus appears that in California and Oregon, embracing five-sixths of the territory and coast line of the United States upon the Pacific, the public surveys have been extended over all non-navigable tide or mud-flats, title to which has vested in those States under and by virtue of the act of Sept. 28, 1850, excepting such as had been disposed of under the general laws of the United States as "public lands."

And it proves nothing to say that in 1875 the General Land Office revoked the instructions to the surveyor general of Oregon, and directed him to limit surveys thereafter to high-water mark. At that time a great part of the coast region must already have been surveyed and the surveys approved by the Department, leaving little to be surveyed. As herein shown numerous Indian Reservations in Oregon and Washington were set apart about the same time by the government, expressly extending to low-water mark. There are no other tide-lands on the Pacific coast, outside of Alaska, and none on the Atlantic except Florida where, as also in Louisiana, Alabama and Mississippi, the public Land States bordering the Gulf of Mexico, it is well known that all swamp and overflowed land, both salt and fresh (outside the Everglades), have been surveyed and platted under the system of public land surveys.

From the foregoing it is clear beyond dispute that over-tide-lands, not "navigable in fact," the public surveys have been extended, and in every other coast State (except Washington which was expressly excepted), all non-navigable tide and mud-flats have been granted to the various States under the Swamp Land Grant Act UPON THE CERTIFICATION OF THE SECRETARY OF THE INTERIOR HIMSELF THAT THEY HAD BEEN SURVEYED, AND WERE INCLUDED IN THE TERMS OF THAT ACT.

It is in Washington, which can claim nothing under that act, that the common law doctrine of sovereignty over such lands is invoked.

The fact that some land official reverses the instructions of a predecessor, and limits the official surveys to high-water mark when they had formerly extended to low-water mark, does not render the areas affected any more "unsurveyable" than they were before. Nor can the policy of the government from its foundation to sell and otherwise dispose of such lands under every species of enactments, be defeated or interrupted by a mere land office circular or regulation issued in April 1875, and liable to be revoked at the pleasure of that office. Large mountainous areas are likewise withheld from survey by the instructions of the Land Commissioner, but this does not render them "unsurveyable." From the acquisition of California and Oregon (which also included the present State of Washington) down to April 1875, when the land office circular appeared, it was the settled policy of the United States to extend the public surveys to low-water mark in all that region, following in this respect what had been the policy with respect to the rest of the national domain theretofore.

It is a matter of public record, much of it the subject of judicial cognizance, that portions of the public domain, were "reserved" for disposition under special laws, and that all the rest of it has been subject to appropriation under every form of private and public grants. Under this state of things, and several years prior to the appearance of the aforesaid land office circular of April, 1875, limiting surveys to high-water, Congress passed the acts of July 17, 1854, and April 5, 1872, effecting an exchange of lands with the Sioux Indians and Thomas B. Valentine respectively.

Under the act of 1854, about 313,000 acres of scrip were issued by the United States to the Indians *in exchange for an equal quantity of lands* along Lake Pepin.

It is estimated that about 300,000 acres of this scrip have thus far been located and patented, much of it prior to the circular of April, 1875. It had been located, as the official records show, not merely upon agricultural lands, both wooded and prairie, but also upon every other kind of land in the public domain (unless "reserved") that was "surveyable," (and tide-flats were surveyable up to 1875, at all events) both surveyed and unsurveyed.

When the bill, now known as the act of April 5, 1872 (see Cong. Globe, second session, Forty-second Congress p. 1186) was under consideration. Mr. Taft (a member of Congress) asked this question:

"I would like to ask the gentleman a question as to the character of the scrip which is proposed to be given. I understand it is not to be issued under any existing law, and that there is no qualification as to location of it, whether surveyed or unsurveyed, minimum or double minimum land.

"The only exception I believe being as to mineral lands. * * * Mr. Townsend (Pa.) stated that he understood the bill as it was drawn, and his remarks coincided with the same."

If the term "public land" excludes all lands not subject to disposal under *general laws*, why should "mineral lands" only have been excluded from the exchange, if it was also intended to exclude other classes of lands?

If it had been intended by Congress to limit Valentine to the class of lands erroneously alleged to be described as the "public lands," in Newhall vs. Sanger, (92 U. S. 761) then the reservation of "mineral land," (itself then and now a special class not subject to the operation of general laws), was not only unnecessary but absolutely meaningless, if not absurd. In Leavenworth, etc., vs. U. S., 92 U. S. 751, it was said by the Court: "But treaties, like statutes, must rest on the words used—nothing adding thereto, nothing diminishing." In Rex vs. Barrell, 12 Ad. and Ell., 468, Patterson, J.

said: "I see the necessity of not importing into statutes words "which are not found there. Such a mode of interpretation only "gives occasion to endless difficulty. Courts have always treat- "ed the subject in the same way, when asked to supply words "in order to give a statute a particular meaning, which it would "not bear without them."

Rex vs. Poor Law Commrs., 6 Ad. & Ell., 7.
Everett vs. Wells, 2 Scott (N. C.) 531.
Green vs. Wood, 7 Q. B. 178.

The Court further said (*Ibid* p. 745): "The language used is to be taken as expressing the legislative intention, and the large in ference attempted to be drawn from it is not authorized."

And further construing the grant: "But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to the survey and division into sections, and to them alone this grant is applicable." Ibid 741. Note also p. 740.

The Courts will not presume that the law-making power uses language in a vain sense, and especially must this be true when the language used is such, that taken in its ordinary and literal acceptation, its meaning would be consistent with reason Certainly it would be a most remarkable thing if judicial construction is to import into a statute a meaning that materially alters and abridges its plainest terms.

In the Leavenworth etc. R. R. Co. vs. U. S. (*supra* 733) the question was whether a grant of lands to aid that road also included lands along its route through an Indian reservation. The *specific character of the lands granted, as whether they were prairie, timber, desert, swamp or the like*, was not in the mind of this court when the Leavenworth, the Newhall-Sanger, the Wilcox-Jackson, or any other of the authorities therein referred to, were decided.

The question the court did pass upon, in that regard, and no other, as its own language shows, was solely directed to the question whether the lands claimed under the different grants, were "public lands" in the sense of their being still the property of the United States, and not in respect to their quality.

Not one of the decisions above referred to even alluded to the *quality* or *character* of the lands *per se* involved. In every case the question was *whether the lands had been devoted to any other purposes!* And that consideration alone determined whether or not they belonged to the "public lands."

In the Leavenworth case (*supra p.* 746) this court said: "In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive the benefit of them. This proviso has, in our opinion, no doubtful meaning. Attached in substantially the same form to all railroad land-grant acts passed since 1850, *it was employed to make plainer the purpose of Congress to exclude from their operation lands which by reason of prior appropriation, were not in a condition to be granted to a State to aid it in building railroads.* It would be strange, indeed, if by such an act, Congress meant to *give away property* which a just and wise policy had devoted to other purposes." * * * "*The proviso was not necessary to do it, but it serves to fix more definitely what is granted by what is excepted.*" * * * p. 749 (*supra*). "And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant; *and it makes no difference whether or not they subsequently became a part of the public lands of the country.*"

They were not then owned by the United States. They were not "public lands," BUT WERE INDIAN LANDS, AND FOR THAT REASON ALONE, were not subject to the grant; and the CHARACTER or QUALITY of the lands embraced in the alternate sections along

the route had nothing whatever to do with the issue. But if, for example, some of the lands along the route, outside the Indian lands, had been classed as "mineral," no reservation would have been necessary to exclude THEM from the grant.

At the date of the passage of the act of April 5, 1872, the decision now relied upon as the authority to say *what* lands the Congress of the United States had in mind when it referred to "public lands" after making an express reservation of a particular class of land in the exchange with Valentine—had not then been rendered, and was not till three years afterwards, and not till over twenty years after that of July 17, 1854. *Whatever* may *now* be intended by the use of the words "public land," in the light of the now misconstrued authority of the Newhall-Sanger case, in legislation, it would manifestly be no just evidence of what *was* in the minds of the parties to those exchanges in 1854 and 1872, to make a rule of construction merely, proclaimed years afterwards, the test of it, and that too against the express language of the statutes themselves. As special reference is made in the Newhall-Sanger case (*supra*) to Leavenworth, etc., R. R. Co. vs. U. S. (92 U. S. 733), it is deemed proper to say that in both of those cases the construction of "grants" to railroads was involved. In the latter case it was *held*:

1—"*Where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.*"

2—"*The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee, applies as well to grants to a State to aid in building railroads, as to one granting special privileges to a corporation.*"

Both propositions are unquestionably correct, but they relate to "grants" and not to an "exchange," in which an entirely different rule of construction prevails. In the first the rule operates against the grantee; in the other the opposite rule prevails.

Accepting as settled doctrine that soils under "navigable waters" are not the subject of absolute grant by the State because a *jus publicum*, in the shape of a right of navigation or other right, is inseparably connected therewith, to be held in trust for the people, it is, on the other hand, equally clear that the sovereign may and does sell the *jus privatum* in tide and overflowed lands to individuals as an absolute private proprietary interest in cases where there is no *jus publicum* involved.

If the United States, the original sovereign, could not have disposed of the soils beneath non-navigable waters, and only held them in trust for the use and benefit of the people of the future sovereignty of Washington, it is equally clear that the latter cannot do so.

But it is not denied that Washington may rightfully dispose of this class of tide-lands, if title to them ever vested in it, because *any* class of lands belonging to the public domain is the subject of absolute grant, unless reserved, or weighted with a public trust. And if this be true, it is equally clear that the United States as the sovereignty in possession prior to the existence of the present sovereignty of Washington, must also have had the power and right to grant the *jus privatum* in any part of its domains.

In Irvine vs. Marshal, 20 How. 558, it was *held* that "All the lands in the territories not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States to be disposed of to such persons and at such times and in such modes and by such titles as the government may deem advantageous."

See also

Gibson vs. Choteau, 13 Wall, 92.

Shively vs. Welch, 20 Fed. Rep. 28–32.

It was *held* in Case vs. Toftus, 39 Fed. Rep. 733, that, "in the Territories the National Government is both the sovereign

and proprietor. Congress has the power to govern them * * * * and as such sovereign and proprietor it may dispose absolutely of all the public land in the territory, whether *high or low, wet or dry.* For the time being, as sovereign, it has the *jus publicum* or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land, while as a proprietor, it has the *jus privatum* or right of private property subject to the *jus publicum.* (Gould on Waters, Sec. 17). This *jus publicum*, whether held by the National Government during the territorial period, or the state thereafter may be sold or disposed of by either who represent the public."

This Court also affirmed the right of the United States to grant tide lands in the territories, in Goodtitle vs. Kibbe (9 How. 478), wherein Taney C. J., delivering the opinion, said:

"The same question upon the same Act of Congress and patent was brought before this Court in the case of Pollard vs. Hagan at the January term, 1845, reported in 3 Howard, 212. That case was fully and deliberately considered, as will appear by the report, and the Court then decided that the Act of Congress and patent conveyed no title. * * * But this Spanish title was acquired in 1809, and it has been repeatedly decided that a Spanish grant in this territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the soil to the grantee. * * *Undoubtedly, Congress might have granted this land* (i. e., land between high and low water), *to the patentee, or confirmed his Spanish grant* BEFORE *Alabama became a State.* But this was not done."

At the time the decisions in Pollard vs. Hagan (3 How. 212) Mumford vs. Wardwell (6 Wall. 423) and several other similar cases were rendered, the courts still adhered to the common law doctrine as to the navigability of all waters flowed by the tides. The sound doctrine laid down in the Daniel Ball, the Montello, the Genesee chief and other cases had not been enunciated. All the older decisions above referred to were based without excep-

tion upon the common law theory that all waters affected by the ebb and flow of the tides were *navigable in law*. It is stated in the opinion rendered by this court in Mobile vs. Eslava *supra* 251, that the evidence showed the tract in dispute to be "a wide flat covered from a foot to eighteen inches deep when the tide was in; but when out, free from water to the channel of the Mobile River."

This non-navigable mud-flat was the tract which was the subject of litigation in every one of the Alabama tide-land decisions. Yet in all of them it was treated as "navigable" water, and, therefore, as embodying characteristics which rendered its possession essential to the sovereignty of Alabama, although precisely similar fresh water flats a few miles above, along the, in fact navigable, Alabama and Tensas Rivers were, without a question, conceded to belong to the United States as part of the public domains, and the State promptly accepted a grant of them made under the Act of September 28, 1850, and subsequent enactments.

In Alabama the effort to adhere to the common law doctrines, as to the extent or boundary of navigable waters, when dealing with the tide lands of Mobile Bay, has, when dealing with the rights of riparian proprietors on navigable rivers, led to this confusion:

In the opinion of the Supreme Court of Alabama, quoted from by this court in Mobile vs. Eslava p. 253, it was said, that: "To recapitulate, we are of opinion, First, That the *navigable* waters within this state have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same.

"Second, The *navigable* waters extend not only to low water, *but embrace all the soil that is within the limits of high water mark.*"

And under the same theory, neither could Alabama "grant a right of property in the same."

In the recent case of Webb vs. Demopolis (95 Alabama 129) it is declared, however, that, "The rule which this state has "adopted and declared through this court is, that a grant by the "United States to land bordering on a *navigable river* includes "the shore or bank of such river, *and extends to the water line* "*thereof at low water.*"

"Williams vs. Glover 66 Ala. 189.
"City of Demopolis vs. Webb 87 Ala. 670.
"* * * Doe, *ex dem.* vs. Jones, 11 Ala. 63."

In the State of Washington the rule is that the riparian proprietor takes nothing below *high water mark*, as was held in Yesler vs. The Board of Harbor Line Commissioners.

In the State vs. Harrub and the State vs. Melvin, 95 Ala. 176, it was *held* that, "The State of Alabama owns the absolute property in the oyster-beds and oysters in her *navigable waters*, holding it in trust for the use and benefit of her people, subject only to the paramount *right of navigation*." (The italics are ours.)

But Congress also has expressly asserted its right to dispose of tide flats. By "Section 2380, R. S., the President is authorized to reserve from the *public lands*, whether *surveyed* or *unsurveyed*, townsites on the *shores of harbors*, at the junction of rivers, important portages or any natural or prospective centres of population."

Section 2381 provides for their appraisal and sale.

In pursuance of this authority the townsite of Port Angeles, Washington, including a large area of tide-flats, between high and low water mark, has been reserved, appraised and the lots sold by the government to private purchasers.

It will be observed that here, as in all other such sales, "public lands" includes "tide lands." This power has been further repeatedly exercised in setting apart reservations for Indians, several examples of which are here selected from the

"Executive Orders," "Establishing and Defining Existing Indian Reservations," "November 1, 1882, edition:"

THE LUMMI RESERVE.

"EXECUTIVE MANSION,
"November 22, 1872.

"It is hereby ordered that the following tract of country in Washington Territory be *withdrawn from sale and set apart* for the use and occupation of Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi river, * * * * *; thence west along said township line *to low water mark, on the shore of the Gulf of Georgia*; thence southerly and easterly along the said shore, etc. * * *

"U. S. GRANT."

Page 52 *supra*.

Puyallup Reserve (page 56 *supra*): In a letter to the Secretary dated August 26, 1873, the acting Commissioner in speaking of the boundaries of the Puyallup Reserve, said: "More recent surveys, however, develop the fact there is land along this shore, and outside the reservation, arising from *an error of the surveyor in leaving the line of low water mark, along the shore of said bay.* * * * In a report dated March 20 last Superintendent Milroy calls attention to *this inadvertence*, and for the adjustment of the western boundary of said reservation, *so that it may conform to the intention of those agreeing to the same*, * * * he recommends the following, viz.: Instead of the direct line to the place of beginning, to follow the shore line, *at low water mark*, to the place of beginning.

"Inasmuch as the lands proposed to be covered by this change *are in part already covered by the grant* to the Northern Pacific Railroad Company, and by *donation claims*, I would respectfully recommend that the President be requested to make

an order setting apart * * *. This would give them a mile of water frontage directly north of Puyallup River, and free access to the waters of Commencement Bay at that point." September 6, 1873, the President made the order above recommended.

QUINAIELT RESERVE (p. 56-57)

"EXECUTIVE MANSION,
"November 4, 1873.

"In accordance with the provisions of the treaty * * *, it is hereby ordered that the following tract of country in Washington Territory (which includes the *reserve selected* by W. W. Miller * * * and survey by A. C. Smith, *under contract of September* 16, 1861) *be withdrawn from sale and set apart* * *: commencing on the Pacific coast at the *southwest* corner of the present reservation * * *, thence with the course of said river to a point on the Pacific coast *at low water mark*, a half mile above said river; thence southerly at *low water mark*, *along* the Pacific to the place of beginning.

"U. S. GRANT."

SWINOMISH RESERVE (p. 57 *supra*).

"EXECUTIVE MANSION,
"September 9, 1873.

"Agreeable to the within request of the acting Secretary of the Interior, it is hereby ordered that the northern boundary of the Swinomish Reservation, in the Territory of Washington, shall be as follows, to-wit: Beginning *at the low water mark on the shore of Sim-ilk Bay*, at a point where the same is intersected * * *; thence north on east line of said section three to a point where the same intersects *low water mark on the western shore of Padilla Bay*."

TULALIP OR SNOHOMISH RESERVE (p. 58 *supra*).

"EXECUTIVE MANSION,
"December 23, 1873.

"It is hereby ordered that the boundaries of the Snohomish or Tulalip Indian Reservation, in the territory of Washington, * * *, shall be as follows, to-wit: Beginning *at low water mark* on the north shore of Steamboat Slough at a point where * * *; thence west on said township line *to low water mark on the shore of Port Susan*; thence southeasterly *with the line of low water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Eberg's Slough to the place of beginning.*

"U. S. GRANT."

The Surveyor-General of Oregon was officially directed by the Commissioner of the General Land Office to extend surveys *to low water mark in tide lands* in the year 1853, and those instructions remained in force till April 14, 1875, a period of twenty-two years.

And the Land Department has long treated the tide or mudflats of Washington and Oregon as "public lands" by confirming entries and issuing patents for large quantities of such lands, of which a small list is already before this court in other briefs in these cases.

Swamp and Overflowed Lands have been long recognized as subject to disposition under general laws as well as by locations of scrip. By the Act of March 2, 1855, it is provided that, "*where the lands (swamp and overflowed) have been located by warrant or scrip*, the said State (Illinois) shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry at $1.25 per acre or less, and patents shall issue therefor. * * *" The public records in the Land Department show that Lakes Wolf, Hyde and George in the States of

Illinois and Indiana were located with Sioux Half-Breed scrip, and the same adjusted, in part, February 8, 1876; patents for the same were thereafter duly issued by the United States. These locations, were, in part, as follows :

S. H. B. Scrip No. 567 E., R. & R. No. 4.

S. H. B. Scrip No. 582 E., R. & R. No. 5, on Sec. 13, Tp. 37, R. 10 W.

S. H. B. Scrip No. 10 E., R. & R. No. —

S. H. B. Scrip No. 524 D., R. & R. No. 3, on section 12, Tp. 37, R. 10 W.

Also part of Sec. 24, Tp. 37 N., R. 10 W., 2d P. M. in Indiana.

Also additional H'd. certificates on Lots 5, 6 and 7 Sec. 7, Tp. 37, R. 9, and other locations.

Reference has been made to various *dicta* in several decisions by this and other courts to the effect that tide or mud-flats were not within the purview of the provisions of the general land laws for the sale of public lands.

This assumption is so completely destroyed by the actual course pursued by the government that the attention of the court is respectfully asked, not only to the recitals of such facts in its own decisions, but also to other entries and sales of overflowed lands and mud-flats, gathered from the official records of the government, of which this court may take judicial notice.

It was recited in the City of Mobile vs. Eslava 16 Pet. 233, (1842) that: "The property in question (water lots flowed by "tides) was acquired from the purchasers of the Fort Charlotte "property, authorized to be sold under Act of April, 1818 (Land Laws, 756)"

On page 251 the court says: "The lots were to be advertised "and sold *as other public lands of the United States*, and a patent "was to be issued for each lot. * * *. The lots were neither "surveyed nor sold east of Water street. High tide flowed up "to the street, and in part covered it; but east of it there was a

"wide flat, covered from a foot to eighteen inches deep when the "tide was in, but when out, free from water to the channel of "the Mobile River. This flat was easily reclaimed by embank- "ments and filling up, and was obviously the ground on which a "great part of the city would soon be located. * * *. The flat "has since been filled up, and there are now several streets east "of Water street."

On page 243, *supra*, "In 1822, Water street and the property now in dispute, were between high and low water mark. * * * It was proved on the trial, that in order to reclaim one of the lots in square 2, east of Water street, the owner had *to fill up seven feet.* * * * Another witness stated that he purchased the lot west of the lots in dispute and that he had to fill up his lot before it could be occupied. * * *. and that the company who purchased the lots at the sale of the government, expended about $3,000 for the common benefit of their property and to keep the water from it."

On page 255 *supra*: "Immense bodies of land are flowed "by the great lakes, and subject to be redeemed, * * * From "the first, shores and banks of rivers have been the boundaries of "fractional sections; large quantities of land have been sold and "are now in the market, within the high water mark; many even "on the Alabama River. On the Mississippi most of the frac- "tions are partially overflowed. Towns and villages on the "banks of the river are partly within the high water mark, rest- "ing on patents from the United States, or on confirmed French "and Spanish claims. Scarcely any are exempt from this sup- "posed infirmity of title when situated on tide water or on the "larger rivers, and this is especially so in regard to the towns on "the Mississippi, within the range of country sold out by the "United States. Indeed, one town, at the mouth of the Ohio "(Cairo) is entirely below high water mark, and secured by em- "bankment, so that it is idle to adduce the practice of the govern- "ment as proofs of abandonment. The United States reserved the

"lands under water, and between high and low water mark in "many instances for public use, and subject to grant by special "acts of Congress. * * * That each and all of the States have "sovereign power over their navigable waters above and below "the tide, no one doubts. And it is just as free from doubt, that "the shores and banks of such waters, and the mud-flats flowed "by them are the subject of private ownership. The property "can not be appropriated to the obstruction or injury of the pub-"lic use in the water, further than the state government permits; "and if it is attempted, the obstruction may be abated as a nui-"sance. Whether the Bay of Mobile has been obstructed, is not "a matter of inquiry; no one pretends that it has been. The "question is, *could the flat between high water mark and the chan-"nel of the river be granted by the individual owner, the United "States?* That it could is, I think, free from doubt."

It will hardly be contended by any one that this doctrine of State soverignty and ownership in non-navigable tide-lands and marshes can or does extend to the soil of the beds of all the areas of swamp and overflowed lands that have been made so by the overflow of the navigable rivers and lakes of the United States.

Admiralty jurisdiction having been extended to all water navigable in fact, under the modification of the common law doctrine that limited navigability in law to the ebb and flow of the tides, one, or other, of two propositions must logically result: either the doctrine of State ownership, as a part of their *jura regalia*, in the soils under the ~~beds~~ waters of the non-navigable areas of swamp and overflowed lands, forming a part of our great lakes and navigable rivers, must follow; or, else, the theory of State ownership, by virtue of their sovereignty, in tide lands must be limited to those navigable in fact, and excluded from those that are non-navigable.

It will not be pretended that any *jus publicum* is involved in non-navigable swamp and overflowed lands. The title to such lands was not considered by the United States either as vesting

in the States by virtue of their sovereignty, or their possession as being essential to their political supremacy; nor indeed that they possessed any attribute of public rights that imposed a trust upon the States. Neither do the latter attempt to claim fresh water swamp or overflowed lands by virtue of their sovereignty. The same sound reasoning that led our highest courts to modify and enlarge the common law doctrine of the navigability of waters, also discerned that while indispensable to the sovereign States that they should control and preserve all rights in any *navigable* waters, salt or fresh, within their borders as a perpetual trust for the people, which could not be granted away, it was also true that no public trust, nor any rights incidental and essential to the exercise of the political powers of the State, were involved in the control of the soils beneath the beds of swamp and overflowed lands, even though forming a part of the rivers and lakes, the navigable portions of which did pass into their control as sovereigns as they were severally formed out of Territory of the United States.

See the case of Frank Burns, 10 L. D. p. 367, wherein the Secretary said:

"But, as the lands embraced within the limits of the grant [the Mianda] had been disposed of by the United States *as public lands*, and the proceeds covered into the treasury, it was provided * * *"

The balance passed to California under the act of Sept. 28, 1850, as appears upon the records in the general land office.

In San Francisco Savings Union vs. Irwin, 28 Fed. Rep. 709, it was expressly held that the title of California to mud-flats capable of reclamation (precisely as is the case with lands now involved) was derived, not by virtue of its sovereignty, but solely under the act of Sept. 28, 1850, and this court has since affirmed that decision (136 U. S. 578) yet the tide-flats in San Pablo Bay are as much a part of the Pacific Ocean as the mud-flats in the upper half of Elliott's or Duwanish Bay are of Puget Sound

and the Pacific Ocean. And under the American doctrine that "navigability in fact constitutes navigability in law," the vast areas of mud-flats in San Pablo and Elliott's Bays are no more a part of the "navigable" waters of the Pacific than are the fresh water swamps a part of the "navigable" waters of the Great Lakes and Rivers. The tide-flats in San Pablo Bay and elsewhere having passed to California, *not by virtue of its sovereignty but solely under the provisions of the act of Sept. 28, 1850, as this court unanimously held, by what process of reasoning can it be established that precisely similar tide-flats in Washington vest in that State by virtue of its sovereignty.*

In fact, and in principle the two cases are the same in all respects, and yet this court is asked to reach a conclusion diametrically opposite to its former judgment.

Section 2, Art. XVII of the Constitution of Washington, *supra*, is at once a recognition of the power of the United States to make such a grant, and also a disclaimer of title equivalent to a new grant by Washington in all cases not impeached for fraud. The language used is "patented," but in legal effect it comes within the rule that "a right to a patent vested is equivalent to a patent issued."

Stark vs. Starrs, 6 Wall. 402.
Gibson v. Chatteau, 13 Wall. 92.
Lessieure vs. Price, 12 How. 59.
Sheply v. Cowan, 91 U. S. 330.

Under the doctrine laid down in the Genesee Chief and other cases, and now recognized as the settled law, declaring all waters "navigable in fact, navigable in law," regardless of the ebb and flow of the tides, it would be no more competent for the State of Washington to assert ownership, by virtue of its sovereignty, up to and including the shore lines at ordinary high-water mark of all swamp and overflowed lands forming a part of any navigable fresh waters within its boundaries, than to assert

ownership by virtue of such sovereignty in wide areas of salt-marshes and mud-flats similar to those in San Pablo and Elliott's Bays.

WHAT WATERS ARE "NAVIGABLE."

The Supreme Court, in the U. S. vs. The Montello (11 Wall. 411), said: "This court held in the Daniel Ball (10 Wall. 557), that those rivers must be regarded as *public navigable rivers in law which are navigable in fact.* And they are navigable in fact when they are used, or *are susceptible of being used in their ordinary condition* as highways for commerce, *over which trade and travel are or may be conducted in the customary modes of trade and travel on water.*"

Discussing this subject in Barney vs. Keokuk (94 U. S. 324), this court said: "The confusion of navigable with tide-water found in the monuments of the common law long prevailed in this country, notwithstanding the broad difference existing between the extent and topography of the British island and that of the American continent." * * * * "In our view of the subject the correct principles were laid down in Martin vs. Waddel, 16 Pet. 367; Pollard vs. Hagan, and Goodtitle vs. Kibbe, 9 How. 471. These cases related to tide-waters, it is true, but they enunciate principles, which are equally applicable to all *navigable* rivers." (It is to be observed that only waters regarded *as* "*navigable*" were discussed in any of the foregoing cases.)

The late decision of this Court in the Ill. Cent. R. R. Co. vs. Illinois is an exhaustive review of riparian rights and State sovereignty. It is to be noted, however, in order to avoid confusion as to the issues involved in that and the present cases, that the lands there involved formed a part of the *littus maris*, or shore proper—the narrow strip reclaimed being only about 200 feet wide, and therefore would come as clearly within the terms

of the decision as the navigable waters of the rest of the harbor. But there were no wide areas of non-navigable mud-flats such as were considered by this Court in Wright vs. Roseberry; San Francisco Savings Union, and other cases; and as are here involved. Discussing the limitations upon admiralty jurisdiction this Court said, (*supra*) "When the reason of the limitation of "admiralty jurisdiction in England was found inapplicable to the "condition of navigable waters in this country, the limitation "and all its incidents were discarded.

"So also, by the common law, the doctrine of the dominion "over and ownership by the crown of lands within the realm "under tide waters is not founded upon the existence of the tide "over the lands, but upon the fact that the waters are navigable, "tide waters and navigable waters, as already said, being used as "synonymous terms in England.

"The public being interested in the use of such waters the "possession by the private individuals of lands under them "could not be permitted, except by license of the crown. * * "The doctrine is founded upon the necessity of preserving to the "public the use of *navigable waters* from private interruption and "encroachment, a reason as applicable to navigable fresh waters "as to waters moved by the tide. We hold therefore * * * "*that the lands are held by the same right in the one case as in the "other, and subject to the same trusts and limitations.*"

(Italics are ours).

If the doctrine of state sovereignty, therefore, is to be held to apply to all tide-waters, whether navigable in fact or not, as part of its *jura regalia*; and if it be the settled doctrine that in America the doctrine of state sovereignty applies to all the soils under all rivers and lakes navigable in fact, and that the States hold the same in trust for the people: Then, if admiralty jurisdiction and state sovereignty be equally applicable to tide and navigable fresh waters, how can the States claim as sovereigns the proprietorship in the soils of mud-flats under non-navigable

tide waters, and not also be entitled, upon the same grounds, to assert their rights as sovereigns to the soils under the waters of swamp and overflowed lands, that are in every sense as much a part and a result of the presence and extension of the waters of the adjoining navigable rivers and lakes, as the non-navigable mud or tide-flats are of the adjoining navigable salt waters?

The reason for the extension of admiralty jurisdiction over navigable fresh and navigable tide-waters being, as said by Taney, C. J., "precisely the same," to-wit: 'Their navigability in fact,' it would follow that admiralty jurisdiction should not extend over wide areas of non-navigable salt or mud-flats any more than it does over non-navigable swamps and overflowed lands forming a part of navigable fresh waters. In the language of the Court in the Genesee Chief, (*supra*), "If a distinction is made on that account, it is purely arbitrary, without any foundation in reason, and indeed would seem to be inconsistent with it."

Upon its admission as a State, Calafornia, as *sovereign*, claimed the title, as part of its *jura regalia*, to *all the mines of gold* and *silver within its limits*, which assumption was sustained by its Supreme Court, in Hicks vs. Bell, 3 Cal., 219, citing Pallard's Lessees vs. Hagan in support thereof; and it was not till 1861 that this doctrine was overthrown and reversed.

The distinction between those rights of sovereignty which were merely *incident*, and those which were *necessary* to the Crown, as part of its *jura regalia*, was drawn with masterly ability by a distinguished member of this court, when presiding as Chief Justice of California in the case of *Moore vs. Smaw*, 17 *Cal.*, 218, wherein it was said: "It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership

stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State or Nation. Whatever rights are essential to the existence of this authority are rights of sovereignty.

"Thus the power to declare war, to make treaties of peace, to levy taxes, to take private property for public uses—termed the right of eminent domain—are all rights of sovereignty, for they are rights essential to the existence of supreme political authority.

"To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential.

"Its minerals do not differ from the great mass of property, the ownership of which may be in the United States or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right: by the right of ownership, and not by the right of sovereignty."

Respectfully submitted,

JOSEPH H. PARSONS,

Attorney for Intervenor, LOUIS LANGIE.

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Office Supreme Court U. S.
FILED.
APR 13 1894
JAMES H. McKENNEY,
CLERK.

Mann

vs.

The Tacoma Land Company.

POINTS OF ARGUMENT ON BEHALF OF THE TACOMA LAND COMPANY, APPELLEE.

The appellant claims to be the owner of three separate forty-acre tracts of the tidal flats in Tacoma Harbor, under a location thereon of land scrip called Valentine Scrip. The Act of Congress approved April 5th, 1872, authorizing the issue of this scrip, provides:—

"The claimant or his legal representatives may select, and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys."

(17th Stat., 649.)

It must be conceded that the Act gives a right to appropriate any unoccupied public land of the United States, without limitation as to the manner of use. Had it been the case of a specific grant, designated by metes and bounds, or capable of identification by subject-matter or the object of the grant, and qualified by conditions as to improvement and use, protecting the interests of the public, and, in short, showing a conscious and intelligent purpose on the part of Congress, a wholly different question would be presented; but it is self-evident that if the Act is to bear the effect imputed to it, it

must be as the result of a legal intent quite inconsistent with the real intent of the Congress, which passed the Act.

The court below dismissed the bill in a brief, but satisfactory, opinion, printed at pages 24–5 of the record. It is felt to be unnecessary to add anything to what is there said, but in the argument of the appeal from the Commissioner of the General Land Office, before the Department of the Interior, it was stated that the applications to locate Valentine and other scrip upon lands of this character covered an area of five thousand acres, and included the entire water fronts of the cities of Seattle and Tacoma, and involved the title to property valued at upwards of $3,000,000. This fact may excuse, therefore, a reference to elementary principles and a citation of familiar authorities to establish two points:—

First.—If the Act of Congress of April 5th, 1872, authorized the location of the scrip upon the shores of navigable waters, it would be unconstitutional.

Second.—It does not authorize such location.

First.—No case has yet arisen calling for a decision of this question. In Barney *vs.* Keokuk, 94 U. S., 338, the court says: "The United States has wisely abstained from extending, *if it could extend*, its survey and grants beyond the limits of high water." In the much contested case of the Illinois Central R. R. Co. *vs.* The State of Illinois, 146 U. S., 387, where the construction of a grant by the State was in question, the court held that "there can be no irrepealable contract in a conveyance of property by a grantor in disregard of the public trust under which he was bound to hold and manage it." Under the law of England the right to the shore of the sea is not a right of property, but a *jus regale* or function of sovereignty, and held in trust for the public. Chancellor Kent says: "It is a settled principle of law that the right to the soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high-water mark, and the shore below the common high-water mark belongs to the State as trustee for the public." 3 Kent, 427. In speaking of the law of England, Chief Justice Shaw says:

"There the rule is that the right of property to high-water mark is in the crown, but it is deemed to be so held in trust for the use and benefit of all the king's subjects, and, therefore, such right of property cannot be granted by the crown to a subject." Parker *vs.* Bates, 13 Pickering. The Supreme Court of Connecticut uses similar language: "By the common law as it stood long before the coming of our ancestors to this country and the settlement of the colony of New Haven, the king, as *parens patriæ*, held the soil under the sea between high and low water mark; he held it not for his own benefit, but for his subjects at large and for the subjects of all States at peace with him; he held it in trust for public uses." State *vs.* Sargent, 45 Conn., 372.

The subject is fully discussed and the authorities collected in the first chapter of Gould on Waters, and in the note to section 21 he cites the Acts of Parliament regulating the control of the seashores, and especially the Act of 29 and 30 Victoria, by which the management of the crown's interest in the shores and beds of the sea and tidal rivers is vested in the board of trade, with certain defined duties.

The rule of the civil law upon the subject was discussed by Mr. Jefferson in the controversy in respect to the *batture* or beach of the Mississippi in front of New Orleans. His pamphlet is printed as an appendix to the eighth volume of his works, and at page 541 he cites the rule upon the authority of Vattel, as follows:—

"It ought to be observed, however, that so far as respects the bed and navigation of rivers, the right vested in the sovereign is a mere trust. It is not alienable—like roads, canals, public buildings." And at page 569 he quotes from the Institutes and Digest to sustain the following proposition: "As to the bed of the river, there can be no question but that it belongs purely and simply to the sovereign as the representative and trustee of the nation. If the river deserts its bed, the Roman law gave it to the adjacent proprietor and the law of France to the sovereign, but while it is occupied by the river, all laws, I believe, agree in giving it to the sovereign, not as his personal property to become an object of revenue or

alienation, but to be kept open for the free use of all the individuals of the nation."

The final and authoritative statement of the law upon this subject, however, is to be found in Mr. Justice Field's opinion in the Chicago Lake Front Case, pages 452–461.

Such being the general doctrine in respect to the want of power on the part of the sovereign to make a grant of any part of the seashore for private purposes, the power of Congress is further limited by certain considerations peculiar to our own constitutional system. The power to make title to property in the United States and territories is found in the third section of the fourth article, which gives it the power to dispose of the territory or other property belonging to the United States; but this grant must certainly be construed in subordination to other provisions of the Constitution, and with reference to the general doctrines of public law as understood at the time of the adoption of the Constitution. As to the shores and soils under navigable waters within the thirteen original States, it has been repeatedly declared by this court that the title vested in the people of each State. In the leading case of Martin *vs.* Waddell, 16 Peters, 414, the court says: "The men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of others."

In County of St. Clair *vs.* Livingstone, 23 Wall., 68, the court says: "By the American Revolution the people of each State in their sovereign character acquired the absolute right to all their navigable waters and the soil under them; the shores of the navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively, and new States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

The relation of the United States Government to the navigable waters of the territories is, of course, not precisely similar to that of the king in Great Britain or of the State after it has been admitted to the Union, where the title is held in trust for the public, for it has been repeatedly decided by this court that the title is held in trust for the future State thereafter to be created. By the Act of Congress of March 2d, 1853, to establish the territorial government of Washington, a territory was laid off, which had a vested right at some future day to become a State upon the performance of certain conditions precedent. There has been some discussion as to how far the decisions declaring that the United States held the lands as a trustee for future States depended upon the terms of the acquisition, and it has been alleged that Oregon and Washington were acquired by original discovery, so that no limitation ever existed upon the absolute dominion of the United States.

It is true that in the long discussions over the title to Oregon, the claim to the valley of the Columbia River by right of discovery in 1792 was always asserted, but it is equally true that the United States also claimed title by virtue of the rights acquired under the treaties with France of 1803 and with Spain of 1819. The point is not of sufficient importance to make it worth while to go into any elaborate discussion, nor call for a decision of the question, but it is believed that any court would hesitate before deciding that the title under these treaties was not good and valid. A convenient review of the controversy is given in the History of Oregon in the American Commonwealth Series, and by Greenhow in his History of Oregon, and by Mr. Bancroft.

The Act of Congress of February 22d, 1889, enabling the people of Washington to form a constitution and State government, and to be admitted to the Union on an equal footing with the original States, declares in its eighth section that "If the constitutions and governments of said proposed States are republican in form, and if all the provisions of this Act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his

proclamation announcing the result of the election in each, and thereupon the proposed States, which have adopted constitutions and formed State governments as herein provided, shall be deemed admitted by Congress into the Union under and by virtue of this Act, *on an equal footing with the original States*, from and after the date of said proclamation."

The effect of this language has been repeatedly considered by this court. In Bridge Company *vs.* The United States, 105 U. S., 490, the court says: "Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide-waters within her limits passed to the State." In Huse *vs.* Glover, 119 U. S., 546, the court says: "That on her admission she (Illinois) at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States."

If the title to Oregon should be regarded as having been acquired under the treaty of 1803, then the third article of that treaty provided that "the inhabitants of the said territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."

This stipulation, as Mr. Henry Adams points out in his recent history of the United States, vol. II., page 45, was taken from Bonaparte's *projet*, with slight alterations, the original language being, page 40, that "In consequence of the said cession of Louisiana, its territory and its proper dependencies shall become part of the American Union, and shall form successively one or more States on the terms of the Federal Constitution." It is true that this agreement was made in violation of Secretary Madison's instructions, which forbade the promise, but it was subsequently accepted and acted upon as the law governing the relations of the United States to the inhabitants of the new territory. Whatever view may be taken of the right of the Federal Government to acquire new Territories and to admit new States, or as to the power of Con-

gress over the Territories, the whole history of the country shows that the holding of the Territories was regarded but as a temporary and incidental holding for the benefit of the future States, so that when admitted the new States should come in upon an equal footing with the original States. Thus, in Webster *vs.* Harbor Commissioners, 18 Wall., 65, 66, this court says: "Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future State."

Second.—It is still more clear, however, that the Act of 1872 did not authorize the location of Valentine Scrip upon the shores and tide-waters of the United States. It is undoubtedly true, as was contended in the case of Prosser *vs.* The Northern Pacific Railroad Company, that the right of the State to legislate upon such subjects is subordinate to the right of Congress, in case Congress should elect to establish its own regulations, with a view of promoting the free use of navigable waters. (See thirty-fifth section of Gould on Waters, and cases cited in the notes, particularly Savannah *vs.* State, 4 Ga., 26; Gilman *vs.* Philadelphia, 3 Wall., 713; Bridge Co. *vs.* U. S., 105 U. S., 470.) In fact, by the seventh and twelfth sections of the Act of September 19th, 1890, Congress did undertake to control the improvement of all the navigable waters of the United States, and required all harbor lines to be established under the direction of the Secretary of War. In pursuance of this general policy, the legislation from 1888 to 1891 provided for the improvement of the harbor of Philadelphia by removing the islands in the river Delaware and establishing new harbor lines, which will permit of the construction of piers six hundred feet long, so as to accommodate steamships of the modern type, such as the new war vessels under construction at the Cramp shipyards. In such cases, Congress or the State is simply making the shore available for public use, and the grantee takes the property, charged with a duty to the public. In all harbors the right of the private riparian owner is subject to regulation. The dock continues part of the

highway, and if not in use by the owner of the bulkhead or pier, it may be used by any other vessel, subject to the reasonable regulations of the port wardens or harbor commissioners. The present grant is not of this character, and it is to be construed, as Chief Justice Black said in Commonwealth *vs.* Erie R. R. Co., 3 Casey, 339, according to the canon that "a doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation." The authorities under this head are fully collected in the notes to the thirty-sixth section of Gould on Waters.

Thus it has been ruled that a grant of "soils" did not include lands covered by navigable waters, and that the grants of lands bordering on the seashore did not extend beyond the low-water mark. Or, as Mr. Angell, in his work on Tide-waters, page 153, says: "Soil which is flowed by tide, whether reclaimed from the water or not, is not land." So, in United States *vs.* Gratiot, 14 Pet., 537, the Supreme Court says: "The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word 'land;' and, as we have heretofore shown, the soil underlying navigable waters is not land." The land only extends to high-water mark—all below is water. The same rule has been adopted in numerous States in reference to the grants of land bordering upon navigable rivers. It has invariably been held that under the general laws of the States the land could not be appropriated under the bed of navigable rivers. In Freytag *vs.* Powell, 1 Wharton, 536; Poor *vs.* McClure, 77 Penna. St., 219; Norfolk City *vs.* Cook, 27 Grattan, 433; Chapman *vs.* Hoskins, 2 Maryland Chancery, 485; Tabor *vs.* Sawyer, 2 Hawks, 226; Taylor *vs.* Longley, 40 Cal., 471; Bell *vs.* Morrill, 26 Cal., 336; Haight *vs.* Keokuk, 4 Iowa, 213; Meyers *vs.* City of St. Louis, 8 Mo. Ap., 266, the doctrine in respect to lands bordering upon or underlying navigable rivers is stated with great clearness. A specially instructive case is that of Chapman *vs.* Hoskins, *ut supra*, of which the syllabus is as follows: "The land for which a patent was sought in this case was covered by navigable waters and so situated that in case the waters should recede the rights of a riparian owner would

attach. Under these circumstances, a grant was refused upon the ground that it could convey no substantial rights, and its only effect would be to tempt the grantee into a contest with the riparian owner or to interfere with the public right of fishing and navigation, which the State can neither destroy nor impair." It is true that there has been, and still is, some conflict of opinion in the United States in regard to navigable rivers. Chief Justice Tilghman held, in Carson *vs.* Blazer, 2 Binney, 475, as far back as 1810, that the question was one of fact, and that a river would be regarded as navigable if so in fact, although it was above the ebb and flow of the tide. In New York and other States the common law has prevailed, and a grant bordering upon a river has been held to extend to the middle line; but the doctrine of Chief Justice Tilghman has met with general acceptance, and the Supreme Court of the United States, in R. R. Co. *vs.* Schurmier, 7 Wall., 272, has finally adopted the same rule, as it had previously discarded the test of navigability derived from the ebb and flow of the tide in the case of the great lakes. The most elaborate discussion of the subject is perhaps to be found in McManus *vs.* Carmichael, 3 Iowa, where the briefs of Judge Grant upon one side, and of Judge Dillon upon the other, exhausted the law bearing upon this subject. It will be observed that in these cases the effort was to assimilate the law relating to rivers navigable, in fact, to those in which the tide ebbed and flowed, or to the bays and inlets of the ocean itself. It was assumed throughout all the discussions that the law in regard to the shores of the ocean was clear and indisputable, and the question was whether the jurisdiction of admiralty should be extended and the presumptions in reference to grants bordering upon tide-water should be enlarged so as to include the cases growing out of the navigation of inland waters, which were navigable in fact, though not so regarded at common law. It was always assumed that if the courts could be brought to hold that such rivers were also navigable in law, then the grant would terminate at the water's edge, and the land covered by the water would not be subject to appropriation under the general system of public lands which the State

had established; and, in fact, many of the States and the Supreme Court of the United States have so decided; but, if so, then it would follow that the question could never have been considered an open one in the case of the public lands of the United States bordering upon the ocean, covered by the ebb and flow of the tide. In many cases (see especially R. R. Co. *vs.* Schurmier, 7 Wallace, 288) the legislation of the United States with reference to navigable rivers has been cited and relied upon, and the fact that the Acts of Congress had declared that rivers should be navigable has been accepted as conclusive evidence that Congress did not intend the grant to go beyond the high-water mark. It is obvious that this argument would have had no weight if it could be considered an open question as to whether or not a grant bordering upon tide-water extended to low-water mark.

Attention might also be called to the rights of the riparian owner, but it will, perhaps, suffice to refer to the single case of Yates *vs.* Milwaukee, 10 Wallace, 497.

It is also clear that all the Acts of Congress relating to the public lands are to be treated as *in pari materia* with the Act of 1872, and the Acts relating to pre-emption and to homesteads all assume capacity for survey, settlement, and occupation as the necessary characteristic of the lands to be taken up under their sanction. The land in question cannot be made to conform, when surveyed, to the general system of the United States land surveys, as the commissioner was directed, as far back as April 14th, 1875, to instruct his deputies, when surveying lands bounded by waters affected by the ebb and flow of tides, to extend the lines of survey only to high-water mark. (Division E, Record, vol. II., page 287.) So Secretary Lamar ruled, July 12th, 1887, in the case of J. H. Hall, 6 L. D., 20, that there is no law authorizing the survey and disposition of meandered lakes.

This court has ruled that the words "public lands" mean such lands as are subject to sale or of disposal under the general laws (Newhall *vs.* Sanger, 92 U. S., 761), and in the case of the Ivanhoe Mining Co. *vs.* The Keystone Mining Co., 12 Otto, 166, it ruled that the uniform reservation

of mineral lands from survey, from sale, and from pre-emption compelled the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of these sections to the State. In the United States *vs.* Pacheco, 2 Wall., 590, the courts ays: "When the sea or a bay is named as a boundary, the line of ordinary high water is always intended;" and in the leading case of Mayor *vs.* Eslava, 9 Porter, 378, the Supreme Court of Alabama said that "The shore is regarded rather as part of the water than as land, and it is believed that there is no instance in which the United States, after having sold the land o high-water mark, has afterward asserted the right to dispose of the soil between that and low-water mark."

The term "public lands" has, however, been defined in another series of decisions which also renders its meaning incapable of dispute. In the numerous Acts admitting the States to the Union they have been required, as a condition of admission, to disclaim all right and title to the waste or unappropriated lands lying within the said territory; and a similar disclaimer was, of course, required from the State of Washington, but the seventeenth article of the Constitution of Washington declares that the State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows. And it has been uniformly held that such disclaimer neither left the shores of navigable waters in the United States as part of the public lands, nor deprived the State itself of the title to all below high-water mark. The leading case is that of Pollard's Lessee *vs.* Hagan, 3 How., 22, which has been cited with approval in more than a score of subsequent cases. One of the most important is that of Weber *vs.* Harbor Commissioners, 18 Wall., 57, where Mr. Justice Field, in delivering the opinion of the court, said: "Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute

property in, and dominion and sovereignty over, all soils under the tide-waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

In the Lake Front case, at page 205, Mr. Justice Field again says: "It is the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide-waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties."

Finally, in dealing with this question, it is necessary that the court should assume that Congress, in passing the Act of 1872, had in mind all of those considerations of a public character which have been so forcibly expressed, from time to time, in the opinions of the courts dealing with this subject. In his argument in the case of New Orleans *vs.* The United States, 10 Peters, 662, Mr. Livingston, at page 689 of his argument, said that a decree depriving the city of New Orleans of the control of its water front would "cut off from all access to navigation the second commercial city of the Union; shut up their streets; render their wharves useless; and, worse than an invading enemy, invest them with a blockade that their valor can never raise," and in his argument in Pollard's Lessee *vs.* Hagan, 3 Howard, 215, that great lawyer, John Sergeant, said: "The improvement of the river shores requires local regulation. They are avenues to navigation, and want a nearer guardian than the United States. Other States

have control of similar property. A State can manage this sort of property better than the United States."

These views of the subject are now so well understood and appreciated that it is incredible that Congress should knowingly have placed the water front of this great territory at the mercy of any one man or set of men. No act of equal folly or recklessness has ever been committed, before or since, by any legislative body, however corrupt or ignorant. No adequate consideration moved from Valentine as compensation for such a grant. The public lands of the United States, open to purchase or settlement, were all that he was entitled to get, and all that Congress contracted to give; and it cannot be possible that it was the intention, under such language as that of the Act of 1872, to give him the power to appropriate the shores and blockade the harbors, and control, in perpetuity, the commerce of Puget Sound.

SAMUEL DICKSON,
For the Tacoma Land Company.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JACOB C. MANN
vs.
THE TACOMA LAND COMPANY. } No. 375.

MILTON L. BAER
vs.
MORAN BROTHERS, COMPANY. } No. 683.

Brief on Behalf of George F. Dearborn (No. 1149), Submitted in the Case No. 683, by Leave of Court.

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Brief on Behalf of George F. Dearborn (No. 1149), Submitted in the Case No. 683, by Leave of Court.

In his character as riparian owner upon Elliott's bay, (harbor of Seattle,) State of Washington,—Dearborn is interested in the question whether owners of *Valentine scrip*, as in cases Nos. 375 and 683;—or of *Sioux Half-breed scrip*, as represented by the intervenor Louis Langie,—were authorized under the laws of the United States, to locate the same in the year 1889 upon flats lying below high-water mark in the bay above mentioned.

We submit that they were not so authorized.

The cases of Shively *vs.* Bowlby, and Prosser *vs.* The Northern Pacific Railroad Company, decided at the present term of this COURT, render it unnecessary, as we believe, to discuss professionally, either now or hereafter, several very important questions in this connection which up to the present time have been fruitful topics of debate. The opinion in the former of those cases must constitute in future a major premise in contentions over titles to tide-water lands by supposed grant from the United States.

In any event we may safely leave any matter here in dispute and unnoticed by us, to the satisfactory brief of Mr. Fay, our learned associate, whose distance from this city has, of course, prevented him from seeing Shively *vs.* Bowlby.

As appears by the records under consideration, and also by the briefs on behalf of Mann and Langie, the single question before the Court is, *Whether holders of* VALENTINE *or of* SIOUX HALF-BREED *scrip were authorized in September or October of* 1889 *to locate such scrip upon the tide-water flats above mentioned.*

No material distinction is suggested betwixt the claims in question, as regard either the titles created by the two sorts of scrip or in reference to the different tracts to which that scrip has been attached.

We may, therefore, be allowed to refer to the other briefs for all details in this connection; and confine ourselves to the question of title alone.

The proclamation by the President of the admission of the State of Washington is dated November 14, 1890 (26 Stat., 1552).

1. The claimants under the *Valentine* scrip assert title under the following provision in section 3 of the statute of 1872, chap. 89 (17 Stat., 649):

"In lieu thereof [viz., of certain lands virtually surrendered to the United States], the claimant [*Valentine*] or his legal representatives may select, and shall be allowed patents for, an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws; and, if unsurveyed when taken, to conform when surveyed to the general system of the United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip in legal subdivisions to the said Valentine or his legal representatives, in accordance with the provisions of this act." (See Brief of Messrs. Smith and McPherson, pp. 8, 9.)

2. The *Sioux Half-breed* scrip was issued under the act of 1854, chap. 83 (10 Stat., 304), which provided that in exchange for lands relinquished by those Indians "according to such form as shall be prescribed by the Commissioner of the General Land Office," the President shall " cause to be issued certificates or scrip for the same amount of land,"—"which said certificates or scrip may be located upon any of the lands within said reservation not now occupied," * * * "or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the Government, upon which they have respectively made improvements." (See brief of Mr. Parsons on behalf of Langie, pp. 5, 6.)

Inasmuch as by the above provision the *Sioux* scrip in question can be located only upon, (1) *lands within the Sioux reservation*, or (2) *lands subject to pre-emption or private sale*, or (3) *other unsurveyed lands not reserved by the Government, upon which they* [the Indians] *have respectively made improvements;* and inasmuch as the tide flats in question were not in 1854 within either of these descriptions, we

shall give no further special attention to the claim of Langie, but leave it, so far as it may therein be included, to the general effect of what we have to say as to the *Valentine* scrip. We notice that the last clause above, in limitation of alternative definition (3) of the class of lands subject to *Sioux* scrip, is neglected in the brief for Langie: viz., that which adds to the previous part of that definition the words "*upon which they have respectively made improvements.*" The word "have" means, as we submit, "have" *at the time of the passage of the statute in which it occurs.* If it had been intended to refer the making of such improvements to the time of filing the scrip, or to any other time after the passage of the statute, the language would have been *shall have.* And the word *have* in the sense above suggested appears also to conform to an obvious public policy in that regard.

Then, as regards the *Valentine* scrip.

This claim is, that under the above-quoted statutory provision, a *selection* of lands on a mud flat in Elliott's bay *below high-water mark* by a scrip-holder confers such an equity to a patent therefor as is *only technically* less than a full legal title from the United States.

In Shively *vs.* Bowlby, already referred to, this COURT, after a most thorough discussion of the whole subject of *jus publicum* and *jus privatum* over lands below high-water mark,—sums up the matter in connection with the present topic, as follows:

"VIII. Notwithstanding the *dicta* contained in some of the opinions of this Court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true.

"Chief Justice Taney, in delivering the opinion already cited, after the subject had been much considered in the

cases from Alabama, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State.' (*Goodtitle* vs. *Kibbe*, 9 How., 471, 478.) In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands below high-water mark, was treated as depending on the terms of the decree of confirmation by a court of the United States under authority of Congress. By the application of that test, no such lands were held to be included in *United States* vs. *Pacheco*, 2 Wall., 587, and some such lands were held to be included in *Knight* vs. *United States Land Association*, 142 U. S., 161. And in *Packer* vs. *Bird*, 137 U. S., 661, 672, Mr. Justice Field, speaking for the Court, after referring to the rule, as stated in *Railroad Co.* vs. *Schurmeir*, 7 Wall., 272, 288, above quoted, that Congress, by the provisions of the land laws, intended that the title to lands bordering on navigable streams should stop at the stream, said: 'The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream.'

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. (*American Ins. Co.* vs. *Canter*, 1 Pet., 511, 542; *Benner* vs. *Porter*, 9 How., 235, 242; *Cross* vs. *Harrison*, 16 How., 164, 193; *National Bank* vs. *Yankton County*, 101 U. S., 129, 133; *Murphy* vs. *Ramsey*, 114 U. S., 15, 44; *Mormon Church* vs. *United States*, 136 U. S., 1, 42, 43; *McAllister* vs. *United States*, 141 U. S., 174, 181.)

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other

public purposes appropriate to the objects for which the United States hold the Territory.

"IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

"As has been seen, by the law of England, the title in fee, or *jus privatum*, of the king or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that *jus publicum* which belongs to the king's subjects,' or, as he elsewhere puts it, 'is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' (Hargrave's Law Tracts, 36, 84.) In the words of Chief Justice Taney, 'the country' discovered and settled by Englishmen 'was held by the king in his public and regal character as the representative of the nation, and in trust for them;' and the title and the dominion of the tide-waters and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each State 'for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.' (*Martin* vs. *Waddell*, 16 Pet., 367, 409–411.) As observed by Mr. Justice Curtis, 'This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights.' (*Smith* vs. *Maryland*, 18 How., 71, 74.) The title to the shore and lands under tide-water, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' (*Hardin* vs. *Jordan*, 140 U. S., 371, 381.) And the territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide-waters and the lands under them are held by the United States for the benefit of the whole people, and, as this Court has often said, in cases above cited, 'in trust for the future States.' (*Pollard* vs. *Hagan*, 3 How., 212, 221, 222; *Weber* vs. *Harbor*

Commissioners, 18 Wall., 57, 65; *Knight* vs. *United States Land Association*, 142 U. S., 161, 183.)

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The above discussion leaves nothing that can be added by us except at a disadvantage, farther than perhaps to make some application of its conclusions.

We may be permitted, however, to say that it furnishes a very impressive development of the elementary proposition stated by Lord Bacon as follows: "Thus if I grant, common in 'all my lands in D,' if I have in D both open grounds and several, it shall not be stretched to common in my several grounds, much less in my gardens or orchard."

This passage is quoted by Broom whilst discussing the well-known maxim, *Verba generalia restringuntur ad habilitatem*

rei vel personæ,—one which applies as well to the present case. "Maxims," [501]. For, although tidal lands may to some common intent be "*unoccupied and unappropriated lands*," yet inasmuch as for the most part, under the general policy of enlightened nations, these remain always unoccupied and unappropriated by private persons it is not probable that in employing the above words Congress had *them* in mind, but only that class of lands which *ordinarily* is so appropriated and occupied; that is, lands which *by general law* are *liable* to such occupation and appropriation; and indeed was no more thinking of that exceptional and very small class of lands owned by the public and under general laws not liable to be occupied and appropriated by citizens,—than the grantor under Bacon's hypothesis was of his "gardens" and "orchard," when using the phrase "all my lands."

In view of the American system of public-land law the above act is therefore to be read as if Congress had said to Valentine, "You may select for occupation and appropriation in satisfaction for your scrip any land whatever of that class which the United States ordinarily allows to be occupied and appropriated by citizens." The *habilitas rei* requires that rendering of the words actually used.

The whole tone and coherence of the above extracts from the opinion in Shively *vs.* Bowlby shows, as we submit, that by the phrase "general laws" in proposition "IX," the COURT means *general statutory provisions:* as well those on behalf of a single person or class of persons as those on behalf of the public at large. It appears that it would be to overthrow a long line of decisions in regard to grants by *private* statutes, as contradistinguished from such as are *public*, if general expressions defining grants in the former were to have a more extended operation than for grants in the latter. The phrase "public land" in the *Valentine* stat-

ute does not include lands affected with peculiar public duties upon the part of the Government to the people, any more than it would in ordinary statutes providing for *current* disposal of the public domain.

It seems, indeed, monstrous to suppose that by the statute of 1872 Congress intended to confer upon *Valentine*, who was then regarded as only a public creditor, and that contingently, an exceptional *option* upon the whole Pacific front of the State of Washington below high water. That scrip covered in all 13,316 acres (Record No. *683*, folio 6), and this amount, if divided into its 333 forty-acre tracts, and thus extended over eighty-three miles, would have gone far to appropriate not only the choicest front of the harbors of Tacoma and Seattle, but also of all other eligible localities of the same sort upon Puget sound. And it cannot be suggested that in 1872, the date of the *Valentine* scrip statute, Congress was not "affected" with an actual notice that the *jura publica* of Puget sound were probably to blossom out into something quite imperial!

The present question is argued on behalf of the scrip-holders as if the only matter involved were, whether *the United States* had power to dispose of the tide flats of Seattle and Tacoma. But the precise question is, whether a commission given to the General Land Office in ordinary terms ("*unoccupied and unappropriated public lands, surveyed or unsurveyed, not mineral*") means more than to instruct that office to deal thereabouts with *that class of lands in respect to which it is usually the agent of the United States.* The question is one as to the range of the authority *ad hoc* of a *standing* governmental agency whose ordinary functions had been prescribed by the same legislature which, in similar general lan-

guage, has imposed upon that agency a new duty. This new duty therefore, so far as the same is not specifically defined, is to be construed as limited by the general character of the agency thus employed;—an agency, to wit, as to such public lands as are subject only to the *jus privatum* of the United States;—*lands*, that is, *ordinarily salable, grantable, and proper*, amongst other things, to *be applied directly as well as indirectly in payment of public debt;* it being no more and no less than a mere debt which the United States were then proposing to settle with *Valentine*.

And upon this point it is to be added, *a fortiori*, that the exigencies of the claimants require them to argue that the statute of 1872 reposed the (as is argued by them) *unbounded* discretion for *selection* therein given, *in the creditor alone;* and left with the Land Department a mere ministerial duty of giving effect to his free choice! In other words, the creditor was to have a roving commission to appropriate, so far, any unoccupied *foreshore* within the entire public domain;—an opportunity which, in the spirit of the alleged grant, has been improved by the selection of lands the great future of which for purposes of commerce, as we have already suggested, however it may excite the imagination, is quite beyond the range of present conception.

In reply to the suggestion that the United States has sometimes disposed of tide-flat lands by means of the ordinary operations of the General Land Office, we submit that such surmised *facts* are not before the Court. The matter suggested (ex. gr.) on pages 22, 23, of the brief for Mann, (No. *375*) is not "judicially cognizable," but is, at most, upon a par with *facts* as to *relief of persons by private act*, or *the proceedings of another court*

(91 U. S., 521), or *pardons of private persons* (19 Wall., 519); and are unlike proclamations by the President of a general pardon (13 Wall., 154), and the like. To bring such matters to the notice of the COURT, therefore, it is necessary that it should have been pleaded, and shown in evidence; and if this had been done it is altogether probable that the action of the Department could have been explained, so far as to show that it did not conflict with the present contention.

And also, if it had been so pleaded, in order to have any effect upon the present contention it must have appeared that such action by *agents* of the United States had been so brought to the attention of the *principal* as to cause the silence of the latter to be an acquiescence *not only in the particular transactions in which it had occurred*, but also, as is required by the needs of the claimants, so as *impliedly to enlarge the ordinary powers of the agent and confer upon it a general jurisdiction in cases like the present, to deal with land involving the* JURA PUBLICA *of the Government.* It may well be that the cases in question involve parcels of land of but minute concern—and so come within the maxim "*de minimis.*"

In conclusion, allowing to special words employed by this COURT in Shively *vs.* Bowlby the weight that the general context of that opinion suggests, the clause in proposition "*VIII*," to the effect that it "*is not strictly true*" that "Congress has no *power* to grant any land below high-water mark in a Territory of the United States," [our italics]—suggests not only that general expressions contained in an ordinary private statutory grant of *public lands, surveyed or unsurveyed, not mineral, &c.*, do not include tide flats lying within the harbors of commercial cities—but even some

query as to whether Congress OUGHT, [at all events], by any terms, to make such appropriation. However this may be, that expression certainly indicates *a rule of construction* for grants of that kind which is of an exceptionally stringent character.

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APRIL, 1894.